

IPBA Journal

December 2016

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NEWS & LEGAL UPDATE





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Inter-Pacific Bar Association

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NEW ZEALAND

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The President's Message

Dhinesh Bhaskaran
President



Dear Colleagues,

As 2016 draws to a close, as always it is time for reflection.

2016 has been a year to remember for many reasons: Brexit; a fascinating US Presidential Election; the contraction of various economies around the world; unpredictable currency fluctuations ... the list goes on.

This undoubtedly gives rise to many uncertainties moving forward. On the economic front, the Trans-Pacific Partnership Agreement seems to be hanging in the balance. What was touted as a remarkable international trade pact with tremendous economic potential may now be reduced to a footnote in history. Another example is the impact that future US foreign and trade policies may have on global trade and ongoing cross-border business.

What looks bleak to some at first blush may, however, constitute opportunities for others. Lawyers are remarkably resilient and innovative people. Anticipating legal issues and growth areas in times of economic trouble and uncertain trade relations is something that many law firms have experience in, while other law firms have started to seriously focus on this. It will be interesting to see how law firms in affected countries will cope moving forward. Some of these issues may be ripe for discussion at our next Annual Meeting and Conference in Auckland in April.

World events naturally do not deter the IPBA from carrying on its business as usual. In my capacity as President, I represented the IPBA at the following events:

1. The second IPBA Asia-Pac Arbitration Day in Kuala Lumpur on 8 September 2016, which was co-organised with the Kuala Lumpur Regional Centre for Arbitration. It was encouraging to note that the number of delegates had increased since last year's inaugural event. I believe that the IPBA Asia-Pac Arbitration Day will be an important event for arbitration practitioners moving forward.

2. The International Bar Association Conference in Washington from 19 to 26 September 2016. While I was there, I engaged with Bar leaders about possible areas of future cooperation between the IPBA and their respective organisations.

3. The Opening of the Legal Year in London on 2 and 3 October 2016, at the invitation of the Bar Council and Law Society of England and Wales. I had discussions with various Bar leaders about issues of common interest, particularly the impact of Brexit on the international legal services market.

4. The Regional Seminar on 'Government's role and regulatory tools in cross-border transactions between Asia Pacific and Europe' in Brussels, immediately after the conclusion of the Mid-Year Council Meeting. Many lawyers from the region attended this event, as did a number of IPBA Officers and other Council members. The topics were interesting and thought-provoking and the event was well received.

The Second East Asia Regional Forum in Seoul on 10 and 11 November 2016. This event was well attended and

the Korean Chapter of the IPBA is to be commended for its efforts in conceiving and organising the event. This is another event that will be a regular event on the IPBA calendar and I expect it to grow from strength to strength.

I wish you all a happy festive season and a prosperous 2017, and I look forward to seeing all of you in Auckland.

Dhinesh Bhaskaran
President

IPBA Upcoming Events		
Event	Location	Date
IPBA Annual General Meeting and Conference		
27th Annual General Meeting and Conference	Auckland, New Zealand	April 6-9, 2017
28th Annual General Meeting and Conference	Manila, Philippines	Spring, 2018
IPBA Mid-Year Council Meeting & Regional Conference		
2017 Mid-Year Council Meeting and Regional Conference (November 10-12 Council only; November 13 open to the public)	London, England	November 10-13, 2016
IPBA Joint Events		
IFLR/IPBA Asia M&A Forum	Hong Kong	March 1-2, 2017
IPBA-supported Events		
Legal Era's "Maked in India Conclave on Business and Challenges for the New Europe, UK & India"	London, England	December 1, 2016
Duxes "2nd Anti-Corruption Compliance EMEA Summit 2016"	Dubai	December 6-7, 2016
Duxes "4th Anti-Corruption Compliance Asia Pacific Summit"	Hong Kong	December 6-9, 2016
Kluwer Law International's Indonesia and SE Asia: 4th Annual International Arbitration Summit	Hong Kong	December 7, 2016
Kluwer Law International's "Turkey & ME: 3rd Annual International Arbitration Summit"	Turkey & ME	December 14, 2016
<p>More details can be found on our web site: http://www.ipba.org, or contact the IPBA Secretariat at ipba@ipba.org</p>		



The Secretary-General's Message

Miyuki Ishiguro
Secretary-General



Dear IPBA Members,

It is always hectic at the end of the year, with everyone trying to finish up business, close out finances, attend social gatherings and prepare for the coming year. Despite your busy schedules, we appreciate you taking the time to keep up with your IPBA membership in 2017. By now you will have received e-mail notices to pay your dues for the upcoming year and will soon get a paper invoice in the mail.

IPBA Mid-Year Council Meeting in Brussels Report

The IPBA Mid-Year Council Meeting and Regional Conference was held in Brussels, Belgium from 7 to 10 October. As per the usual schedule, IPBA Council Meetings were held from Friday through Sunday, while a full-day Regional Conference took place on Monday.

The IPBA Officers and other Council members are constantly thinking ahead to identify IPBA members who could take on leadership positions. Such a process may be shrouded in mystery to some, but in accordance with the spirit of the IPBA, it is meant to be completely transparent and inclusive of all members. All leadership positions begin immediately following the Annual General Meeting at the IPBA Annual Conference, for terms lasting one (Vice President; President-Elect; President), two (Regional Coordinators, Committee Chairs/Co-Chairs and Vice-Chairs), or three (JCMs, At-Large Council Members) years.

The Nominating Committee comprises the President from two years past, who leads the Committee; the Immediate Past President; the current President; and the Secretary-General. Discussions begin in earnest for the next term's leaders from right after the Annual Conference up until late fall. Most positions can be

extended for one more term and leaders who fulfil their duties well are asked to stay on. After candidates are chosen, the IPBA Council members approve the nominations at the Mid-Year Council Meeting. Once approved, those nominations are then ratified by the general members at the AGM at the following Annual Conference. This time, the following nominations were approved by the Council:

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Francis Xavier; Rajah & Tann LLP, Singapore

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Michael Burian; Gleiss Lutz, Stuttgart, Germany

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Hong Kong

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Indonesia

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Korea

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Malaysia

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Steven Howard; Sony Mobile Communications Inc., Tokyo, Japan

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Western Pacific

Neil Russ; Buddle Findlay, Auckland, New Zealand

Middle East

Ali Al Hashimi; Global Advocates and Legal Consultants, Dubai, UAE

There are some changes to the membership leader positions: The Regional Coordinator for Europe will be changed to an At-Large position; and the Regional Coordinator for Asia has been changed to Western Pacific, which includes Australia, New Zealand and the islands west of Midway. Hawaii and the Pacific Islands would then comprise Islands that are US territories or under US leadership. And, you may have noticed that Vietnam has now reached the requisite 25 members to qualify for a JCM. We hope to see more jurisdictions become eligible for a JCM in the future, too.

Be sure to attend the Annual General Meeting, where all IPBA members will be asked to ratify these nominations as well as nominations for committee chairs and co-chairs.

If you have not been a Council member yet, but are interested in becoming more involved in the IPBA, be sure to contact any of the IPBA officers to express your intent. What exactly does a Council member do? This question is raised often, even by Council members themselves! The operation on a practical level of any organisation can be difficult to understand, so the IPBA

Manual and IPBA Conference Manual were developed to support IPBA leaders to fulfil their duties with ease.

The first is meant to guide Council members on how to perform their duties and the second is to help vice presidents plan for the Annual Meeting and Conference. To give you an idea of the tasks involved in keeping the IPBA running smoothly: the IPBA Manual contains an overwhelming 239 pages of information! Realistically, even the most devoted Council member cannot keep up with the content of the Manual, on top of their responsibilities to their firms and clients. Over the next year, the IPBA Manual will be undergoing a revision whereby it will be cleared of redundancy, updated to match current practice and organised in an easily referenced system. It will also be separated into smaller manuals relevant to each position, for easier reference. I will be overseeing the revision, supported by all the Officers and the Secretariat. At the same time, the IPBA President and some past Presidents will be reviewing the IPBA Annual Conference Manual, to make it relevant and also easier to use. This project should be completed by the next Annual Conference in Auckland, just a few months away.

Speaking of Auckland, planning for the Conference is in full swing. April will be here before we know it, and the Early Bird rate ends on 1 February, so be sure to register now if you have not already. President-Elect Denis McNamara has been traveling the world to promote the conference, with great support locally by IPBA members who have organised cocktail events, seminars, lunches and dinners around Denis' visit.

At the same time, planning for the Annual Conference in Manila, 2018 is also picking up steam. The very creative host committee is discussing a schedule that is out of the ordinary: instead of a four-day conference, they are proposing to hold all events over three days. There will be no reduction in the number of committee sessions, social activities or dinners, and the Plenary Sessions will still be held as usual. One of the reasons for the radical change is to allow delegates to enjoy the entire conference without having to miss work for too many days, as well as give some free time after the conference to those who wish to stay longer and enjoy all that the Philippines has to offer. The proposed time frame for the conference is mid-March. More details will be publicised as the conference approaches.

IPBA Website

The IPBA website has been rebuilt three times and has existed in its present form since 2014 with updates and improvements of features from time to time since then. We recognise the importance of a strong online presence and 'upgraded' the Webmaster position from At-Large Council Member to an Officer position. Michael Cartier is the Webmaster and Varya Simpson is the Deputy. Both have already started to work on making improvements to the site and getting everyone involved. Some of the features that exist now are underutilised, so I'd like to explain more about them:

1. Events Calendar

More and more events are being planned by enthusiastic members of the IPBA. In particular, some events are turning into annual events with a loyal following. Be sure to check the IPBA website from time to time to see the latest information.

2. Media Gallery

Photos are uploaded after our events and activities. If any members have photos they would like to share from our events, we welcome them as well! It is always nice to see a different perspective and perhaps you have captured something we could not.

3. Online Membership Directory

The Secretariat often gets asked by members for referrals to other members when seeking advice for a client. However, you all have the ability to find the information yourself at any time of the day or night through the online Membership Directory. You can find it in the Member Only section of the IPBA website. Your profile page is controlled by each of you individually, so you can update your contact information at any time. We encourage you all to also add your photograph to your profile; you can easily upload it to your own profile or send it to the IPBA Secretariat.

4. Committee Forum and Committee Documents

These sections were created to give Committee Chairs the ability to communicate directly with the members of their committees and to upload committee-related documents or papers for everyone to access. Some of the Committee Chairs have been using the Forum feature to send out messages to the members of their committees, such as a call for speakers for the upcoming conference or news of an upcoming event involving

members of the committee. The Forum section is a tool that everyone can use to communicate with each other, too, but in order to make full use of this feature it is necessary to check the website frequently.

5. JCM Forum and JCM Documents

The same concept as the Committee Forum and Documents sections, these features allow JCMs and other membership leaders to communicate with constituents in their jurisdiction or area of responsibility.

6. New website features

The IPBA is always considering new features to make the site useful for our members. We recently added features for the Council members to register for and keep track of meetings online (it was all done on paper before). If you have ideas on how to improve the website, not just for static information but also as a tool to communicate with other members, we welcome any suggestions. Please send them to the Secretariat or to the Webmaster.

This issue of the IPBA Journal helps us celebrate our successes of 2016, while giving us the opportunity to look forward to an exciting year ahead. No matter how you celebrate the holidays, we wish you peace and prosperity, happiness and success. We look forward to our continued friendship in 2017!

Miyuki Ishiguro
Secretary-General

IPBA Mid-Year Council Meeting and Regional Conference in Brussels 7-10 October 2016

The IPBA Mid-Year Council Meeting, followed by a Regional Conference, took place in Brussels from 7 to 10 October 2016. The weekend's events started on Friday, with officers of the IPBA meeting with leaders of the AIJA (Association Internationale des Jeunes Avocats), with which IPBA has a Memorandum of Understanding. Then the IPBA Nominating Committee met to discuss nominations for the future leadership of the IPBA. The evening proceeded with the traditional welcome dinner by the host committee in the sumptuous rooms of the local business club De Warande, attended by all Council members and their significant others. Being in Belgium, the evening necessarily was wrapped up at the bar of the club with plenty of local beers to sample.



Council members, their accompanying persons, and other invited guests enjoyed drinks and dinner at the exclusive business club De Warande.



The IPBA would not run so smoothly without the dedication of the Officers to ensure that progress is made in their areas of responsibility.

Grand Place in central Brussels provided a fantastic backdrop for the Mid-Year Council Meetings.



Brussels Central Station was bustling day and night.



Diversity of jurisdiction, gender, and area of expertise among members of the IPBA Council provides for active and thorough discussion of association business matters.



The Membership Meeting, attended by JCMs, At-Large Council Members, and Regional Coordinators, was led by Membership Committee Chair Anne Durez.

Saturday was witness to productive meetings attended by Officers, Membership Leaders and Committee Chairs, hosted at local law firm Stibbe with the very generous support of CMS and Van Ranst Vermeersch & Partners. The Council Dinner on Saturday evening was held at the top floor of the MAS museum in Antwerp, with an evening view over the port and city of Antwerp. The entire Council met on Sunday, after which a light lunch was served, leaving plenty of time for the attendees to visit Brussels and the rest of Belgium (to the extent they had not already done so). On the other hand, several IPBA Officers continued business by meeting with representatives of the Union Internationale des Avocats, just one of the organisations that is keen to form a closer collaborative relationship with the IPBA.



Committee Chairs and Co-Chairs reported on programme planning for Auckland 2017 and other activities at the Committee Chairs and Programmes Meeting.



The Regional Conference drew close to 90 delegates from around the world.

The regional conference on Monday was attended by a large number of delegates, including lawyers travelling to Brussels, particularly from the Benelux countries and France, leading to a well-attended Regional Conference with close to 90 persons. The topic was 'Government's role and regulatory tools in cross-border transactions between Asia Pacific and Europe'. Following a presentation of market restrictions in emerging economies versus incentives offered by them (with presentations by Sameer Sah of Khaitan & Co for India, Hikaru Ogushi of Nishimura & Asahi for Vietnam and Badaruddin F Vellani for Pakistan), Jack LI (LI Zhiqiang) of Jin Mao Partners presented his views on the Chinese 'One Belt, One Road' initiative. Before lunch,



President-Elect Denis McNamara invites the conference delegates to the IPBA Annual Meeting and Conference in Auckland.



Delegates took advantage of the networking opportunities during the conference breaks.

Audrey Z Chen of Jun He Law Offices, Veronica Roberts of Herbert Smith Freehills and Dr Michael Bauer of CMS had an interesting discussion on Antitrust review as a policy instrument, covering both the European and the Chinese perspective. Following an enjoyable networking luncheon, the afternoon session, presided over by Gerhard Wegen, kicked off with a session on security considerations in assessing and authorising foreign investment with particular focus on CFIUS and other similar regimes with presentations by William A Scott of Stikeman Elliott covering Canada, Erik J Kadel of Sullivan & Cromwell (via video link from DC) covering the United States and Vincent Brenot of August & Debouzy covering France. Finally, Jan Bogaert of Stibbe wrapped up the conference with a lively panel discussion on cross-border bidding wars, with the help of Takashi Toichi from Anderson Mori & Tomotsune in Japan, Adrian Bingel from Gleiss Lutz in Germany, Olivier Diaz from Skadden, Arps, Slate, Meagher & Flom in France, Stephen Glover from Gibson, Dunn & Crutcher in the United States and Dieter Gericke from Homburger in Switzerland. After the closing remarks by Jan Peeters as conference chair, the panel speakers and delegates enjoyed well-deserved farewell drinks.



In addition to IPBA Council Members Audrey Chen (JCM, China) and Jan Peeters (Banking, Finance & Securities Committee Chair and our host in Brussels), many local lawyers attended the Regional Conference and the following drinks reception.



Arbitration Clauses in Government Contracts: Can't Live without Them, How to Live with Them?

This article seeks to first analyse the hurdles to achieving the appointment of independent and impartial arbitral tribunals arising out of arbitration clauses in contractual disputes between the government and private entities and, second, to provide potential solutions to overcome such hurdles in the Indian context.

Introduction: The Prevailing Scenario on Arbitration Clauses in Government Contracts

In the Indian business scenario, it has been observed that, more often than not, entering into a contract with the government is no different from entering into a contract with a bank for a housing loan with 'one-sided terms' and standard formats which are customised to make necessary changes such as naming the parties to the contract. Such one-sidedness also permeates dispute resolution clauses, as they form part of such standard format contracts. The common perception is that national and international entities desirous of doing business with the government generally are left with no option but to affix their seal and signature to such contracts.

However, once disputes arise between such entities and the government, the situation apparently becomes worse as entities are forced to have their disputes adjudicated upon by seemingly 'partial' (which is not always true) arbitrators because the arbitration clause agreed between the parties provided for appointment of either serving officers or consultants or former employees or persons having close business relations with the government as the arbitral tribunal (sole arbitrator or panel arbitrators). In such circumstances,

when the court is approached with the hope of at least having the dispute resolved in a manner that 'impartiality is followed and also appears to be followed', the hurdles before appointment of an impartial arbitral tribunal (under section 11 of the Arbitration and Conciliation Act 1996) are *prima facie* three-fold in nature ('three hurdles'). First, there must be proof to the effect that despite the enormous commercial value of the private entity to the contract with the government, the arbitration clause vesting control with the government for appointment of the arbitral tribunal was due to 'unequal bargaining power'. Second, convincing material must be shown that the balance should tilt in favour of protecting the interests of a private entity as opposed to strictly adhering to the appointment procedure agreed between the parties. Third, permanent and sustainable solutions must be formulated to address the problem of one-sided clauses on appointment of an arbitral tribunal to ensure complete impartial adjudication of disputes. This article seeks to analyse and address the aforesaid three hurdles to achieve appointment of impartial arbitral tribunals and to strengthen India's commitment to adhere to international standards in the field of arbitration.



Legislative Amendment

The Arbitration and Conciliation (Amendment) Act 2015 ('Amendment Act 2015'), which came into force on 23 October 2015, was a positive step by the Indian legislature for several reasons:¹ the insertion of exhaustive parameters for ensuring the independence and impartiality of arbitrators (Fifth Schedule)² as well as the insertion of exhaustive parameters on the ineligibility of arbitrators (Seventh Schedule),³ both read with the new section 12 inserted in the Arbitration and Conciliation Act 1996 (which provides for the grounds for challenging an arbitrator). In the context of one-sided arbitration clauses with the government, where at least seemingly the control over the appointment of the arbitral tribunal and adjudication of the dispute lies with the government, in particular, the newly inserted item 1 provides that justifiable doubts as to the arbitrator's independence or impartiality (Fifth Schedule) or ineligibility (Seventh Schedule) include where 'the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party'. This is a hugely positive measure. However, the larger question is how such a widely worded parameter will be interpreted and then implemented not only by the courts but also by entities entering into contracts (the 'larger question').

Issues Arising

Before addressing the larger question, it is appropriate to analyse a hypothetical factual instance to address the three hurdles: a private entity enters into a contract with the government which contains an arbitration clause for resolution of disputes even before the Amendment Act 2015 came into force. Disputes arise between the parties and one of the parties invokes the arbitration clause after coming into force of the Amendment Act 2015. The existence of a valid arbitration clause is not disputed between the parties; however, there is disagreement on giving strict effect to the procedure for appointment of the arbitral tribunal which is as follows:

On invocation of the arbitration clause, each party shall appoint one arbitrator each from the panel of seven persons to be named by the Government. Party A will make the first nomination and Government (Party B) will make the second nomination. The two nominated arbitrators will appoint the presiding arbitrator. The panel of seven persons will comprise serving or retired persons of Government Departments or Government Companies having requisite qualifications and professional experience.

In such a situation, the stance of the private entity will be against giving effect to the procedure for appointment of the arbitral tribunal even though the same was agreed between the parties and is recorded in the contract. The reasons for the same will primarily include an unequal bargaining power a consequence of which the private entity was constrained to enter into the contract in view of the 'take it or leave it' policy of the government. Moreover, in view of item 1 of the Fifth Schedule and Seventh Schedule of the recently introduced Amendment Act 2015 in relation to where "the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party", the private entity will state that it cannot act in contravention of the law which clearly makes appointment of persons who have a past or present business relationship with the government ineligible to be appointed as arbitrators, even though the parties had agreed to such an appointment procedure.

To the contrary, the stance of the government would be that both the parties entered into the contract with open eyes, including the procedure for appointment of the arbitral tribunal. Moreover, as the government entered into the contract in its private capacity and the private entity has a huge commercial standing in the industry, it cannot now at a belated stage take the stand of unequal bargaining power. Furthermore, there cannot be any bald assumption that the seven persons to be named by the government will necessarily be impartial. Further, the persons being approached for possible appointment as an arbitrator will disclose in writing the existence of any reasons likely to give rise to justifiable doubts as to their independence or impartiality as required under newly inserted section 12 in the Arbitration and Conciliation Act 1996. Therefore, any apprehension on the part of the private entity would be argued to be baseless or at least premature.

Thus, such situations will open the flood gates of litigation as private entities similarly placed as the private entity in the above hypothetical example will approach the courts under section 11 of the Arbitration and Conciliation Act 1996 for appointment of arbitrators. The courts, on such applications would have to balance between giving effect to the appointment procedure agreed between the parties and preserving the legislative intention to ensure appointment of impartial and independent arbitrators.

Courts' Approach

Against this background, it is necessary to examine the Honourable Supreme Court's approach on the importance given to party autonomy and following the appointment procedure of arbitrators agreed between the parties and reaction to the requirement of 'a party to fail to act as required under the agreed procedure'⁴ before entertaining a petition for appointment of an arbitral tribunal by the court. The Honourable Supreme Court in *Northern Railway Administration, Ministry of Railway, New Delhi v Patel Engineering Company Limited*,⁵ noted that section 11 of the Arbitration and Conciliation Act 1996 emphasises adherence to the terms of the agreement 'as closely as possible', even if it may not be 'mandatory on the court' and requires 'due regard' to be given to the qualifications mentioned in the agreement for persons to be appointed as arbitrators.⁶ However, the Honourable Supreme Court in *Union of India v Singh Builders Syndicate*,⁷ appointed a retired judge of the Delhi High Court as a sole arbitrator, even though the arbitration agreement required serving railway officers to be appointed as arbitrators.⁸ Furthermore, the Court explicitly noted that 'a provision for serving officers of one party being appointed as arbitrator brings out considerable resistance from the other party, when disputes arise. Having regard to the emphasis on independence and impartiality in the new act (1996 Act), Government, statutory authorities and Government Companies should think of phasing out arbitration clauses providing for serving officers and encourage "professionalism" in arbitration'.



Recently, the Honourable Supreme Court in *Union of India & Ors v Uttar Pradesh State Bridge Corporation Limited*⁹ ('Uttar Pradesh State Bridge Corporation judgment') reiterated that the principle that the court is bound to appoint the arbitral tribunal as per the agreed procedure for appointment of arbitrators between the parties has undergone significant erosion.¹⁰ Furthermore, the Supreme Court noted that the interests of the disadvantaged party should be equally protected in a one-sided arbitration clause.¹¹ Moreover, the Supreme Court noted that in the case of contracts with government corporations, the terms of the contract are usually drawn up by the government, including the arbitration clause, which gives a dominant position to the government to constitute the arbitral tribunal.¹² However, such clauses have been held to be valid but cast an onerous duty on the government to appoint such persons or officers as arbitrators who can function independently and impartially as well as devote time in conducting the arbitration.¹³ Interestingly, after the Arbitration Amendment Act 2015, particularly item 1 referred to above, which came into force on 23 October 2015, that is, after the *Uttar Pradesh State Bridge Corporation* judgment dated 16 September 2014, the validity of arbitration clauses providing for the appointment of serving officers of the government in a dispute in which the government is a party, is under question. However, it is at least clear that it is not unknown for courts to deviate from the appointment procedure for arbitrators agreed between the parties.¹⁴ The Bombay High Court, after reiterating the law laid

down by the Supreme Court, has noted in *Siddhi Real Estate Developers v Metro Cash and Carry India Pvt Ltd*¹⁵ (*Siddhi Real Estate Developers* judgment) that:

... the courts should as far as possible preserve the sanctity of party autonomy and defer to the appointment procedure agreed to between the parties whilst at the same time retaining a discretion to appoint such arbitrators as may be deemed fit to 'meet the end of justice' It may also be that an order to follow the appointment procedure is likely to result in a 'stalemate' or otherwise 'the interests of justice may require that the appointment procedure ought not to be followed'. In all such cases, the courts are not powerless to ignore the appointment procedure and appoint 'an independent tribunal outside the appointment procedure'.¹⁶

The Bombay High Court in the *Siddhi Real Estate Developers* judgment combined two arbitrations by appointing three retired judges as arbitrators who were to appoint two more arbitrators, despite the agreed appointment procedure providing for the appointment of five arbitrators under the Escrow Agreement and three arbitrators under the Memorandum of Understanding.¹⁷ The Bombay High Court noted that a strict and inflexible adherence to the appointment procedure would lead to a complete stalemate. Hence, to truncate the trial, to reduce a multiplicity of proceedings and the possibility of conflicting decisions (as the disputes had a common genesis), directed for a joint arbitration and deviated from the agreed procedure.¹⁸

Having analysed the key jurisprudence prior to the Arbitration Amendment Act 2015, it is pertinent to examine the approach of the courts after the coming into force of the Arbitration Amendment Act 2015, that is, after 23 October 2015. Recently, on 15 March 2016, in *Panihati Rubber Limited v The Principal Chief Engineer, Northeast Frontier Railway & Ors*¹⁹ the High Court of Gauhati was faced with the issue whether it should allow the arbitrator appointed by the railways to proceed with the matter or whether a neutral arbitrator unconnected with either party should be appointed to adjudicate upon the contractual disputes.²⁰ Noting the Seventh Schedule read with newly inserted section 12(5) of the Arbitration and Conciliation Act 1996 (enacted under the Amendment Act 2015), the court appointed a former judge as the neutral arbitrator stating that a former

The interests of the disadvantaged party should be equally protected in a one-sided arbitration clause.

**Sustainable solutions
to keep the flood
gates of litigation
from opening.**



employee of one party cannot be appointed as an arbitrator.²¹ Similarly, the Delhi High Court in *Assignia-VIL-JV v Rail Vikas Nigam Limited*²² was also faced with the issue whether it should allow the arbitrator appointed by the railways to proceed with the matter or whether a neutral arbitrator unconnected with either party should be appointed to adjudicate upon the contractual disputes.²³ The Delhi High Court noted that if the government entity is allowed to appoint its own employee (present or retired) then the very purpose of the amending act would be defeated.²⁴ Moreover, under the provisions of the Fifth Schedule and Seventh Schedule, when applicable, the court is duty bound to secure the appointment of an independent and impartial arbitrator and to exclude giving rise to a justifiable doubt as to an arbitrator's independence and impartiality.²⁵ Thus, the Delhi High Court deviated from the appointment of the arbitrator as per the agreed procedure (three arbitrators retired or serving with the Rail Vikas Nigam Limited) and appointed three retired judges as arbitrators.²⁶ These two cases before the High Court at Gauhati and the Delhi High Court reinforce the faith of private entities that the procedure for appointment of arbitrators giving a

dominant position to the government will not be given effect to. However, at the same time, the facts of these two cases are only limited to serving or retired 'employees' of the government. Hence, the interpretation of the widely worded parameters (on ineligibility and impartiality) under item 1 such as 'consultant, advisor or has any other past or present business relationship' is not only left unanswered but also is more complicated to address. Moreover, until the Honourable Supreme Court of India is moved under section 11(6) of the Arbitration and Conciliation Act 1996 (which will happen only in the case of an international commercial arbitration²⁷), it is likely that the High Courts of different states, on being moved in cases of domestic arbitration, may give diverse interpretations to the parameters on the ineligibility and impartiality of arbitrators.

Possible Solutions

In view of the aforesaid uncertainty and to keep the flood gates of litigation from opening, it is important to identify and formulate permanent and sustainable solutions to address the problem of one-sided clauses on the appointment of arbitral tribunals and to guarantee the complete impartial adjudication of disputes. The potential solutions to address the problem may be of two kinds, that is, passive or proactive in nature. The passive solution would entail waiting for a disagreement to arise between a private entity and the government on appointment of an arbitral tribunal on the parameters of ineligibility and impartiality in the context of an international commercial arbitration. In such a situation the Honourable Supreme Court of India will be moved and have the opportunity to lay down the law on interpretation of the widely worded parameters on ineligibility and impartiality of arbitrators. However, the Supreme Court, even after being so moved, may not necessarily deem it appropriate to extensively lay down the law and may choose to only provide a fact-specific adjudication. The proactive solution would entail a collective effort on the part of entities routinely affected by the newly inserted parameters when they draft clauses providing for the procedure for appointment of arbitrators, subsequently appoint arbitrators, have disagreements on the appointment of arbitrators and lose time and money in resolution of such disagreements before courts.

One potential proactive solution could be an initiative by the Ministry of Law and Justice in collaboration with other ministries and departments of the government, to create a routinely updated publicly available database

of persons or a panel of proposed arbitrators with details of their relationship with the government, including disclosure of whether such person is or has been 'an employee, consultant, advisor or has any other past or present business relationship'. The creation of such a database will meet two positive outcomes. First, the government will itself be able to continuously monitor persons who have become ineligible to be appointed as arbitrators and will not appoint such a person as an arbitrator in the first place when disputes arise and an arbitral tribunal is to be constituted. Second, the opening of the flood gates of litigation will be prevented as private entities can access such publicly available database as a prior step to moving the court in order to ascertain whether the person appointed as an arbitrator by the government is ineligible or impartial as per the newly inserted parameters by the Arbitration Amendment Act 2015.

The aforesaid proactive solution of creating a routinely updated database is highly recommended, as the government will set a role model for best practices to ensure the appointment of impartial and eligible arbitrators and will prevent unnecessary litigation (which is expected to be voluminous on the issue of the appointment of arbitrators) before the actual adjudication of disputes on their merits by arbitration. In due course, the same exercise of creating such a database on proposed arbitrators may permeate into the private sector by way of a direction by the appropriate ministry of the government to ensure the appointment of independent, impartial and eligible arbitrators in disputes between two private entities.

Notes:

- 1 The views expressed in this article are of the authors alone and not representative of Khaitan & Co. International Law Office, 'Ambiguities in Arbitration and Conciliation (Amendment) Ordinance, 2015' (19 November 2015), available at <http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/India/Khaitan-Co/Ambiguities-in-Arbitration-and-Conciliation-Amendment-Ordinance-2015>.
- 2 Arbitration and Conciliation Act 1996, s 12(1)(b) inserted by the Arbitration Amendment Act 2015, Sch 5, providing the parameters which give rise to justifiable doubts as to the independence or impartiality of an arbitrator, available at <http://www.indiacode.nic.in/acts-in-pdf/2016/201603.pdf>, p 11.
- 3 Arbitration and Conciliation Act 1996, s 12(5) inserted by the Arbitration Amendment Act 2015, Sch 7, providing the parameters which make a person ineligible to be appointed as an arbitrator (unless the parties waive the applicability of such parameters subsequent to the arising of the dispute), available at <http://www.indiacode.nic.in/acts-in-pdf/2016/201603.pdf>, p 11.
- 4 Arbitration and Conciliation Act 1996, s 11(6)(a).
- 5 2008 (10) SCC 240.

- 6 *Ibid* at para 12, paras 11-14.
- 7 2009 (5) MHLJ (SC) 138.
- 8 *Ibid* at para 25.
- 9 2015 (2) SCC 52.
- 10 *Ibid* at paras 13-17, 19-20.
- 11 *Ibid*.
- 12 *Ibid*.
- 13 *Ibid*.
- 14 *Ibid* at para 19.
- 15 2014 (4) Mh.L.J, 283.
- 16 *Ibid* at paras 8-12.
- 17 *Ibid* at para 6 and 12.
- 18 *Ibid* at para 10.
- 19 2016 SCC Online Gau 69.
- 20 *Ibid*.
- 21 *Ibid* at paras 6, 8 and 12.
- 22 (2016) 230 DLT 235.
- 23 *Ibid*.
- 24 *Ibid* at para 52.
- 25 *Ibid* at para 53.
- 26 *Ibid* at paras 28 and 54.
- 27 Arbitration and Conciliation Act, 1996, s 2(1)(f).



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‘Going out’ — Domestic Encouragement of Outbound Investment and Transactions

Since its accession to the WTO in 2001, China’s integration into the global political and economic order has accelerated. In 2013, President Xi’s proposal of the ‘One Belt, One Road’ initiative was a significant signal that the Chinese government encourages foreign investment and trade. The ‘One Belt, One Road’ initiative concerns 65 countries and 4.4 billion people. This is China’s most important and strategic initiative. It is sure to produce major effects on the development of the world economy and politics.

Introduction

Since the turn of the century, China has been playing a significant role in overseas investment and transactions in the world. The Chinese government is implementing an initiative that encourages the ‘going out’ of Chinese enterprises and investment overseas. The ‘Going Out Strategy’ or ‘Going Global Strategy’, is an effort initiated in 1999.¹



Government Encouragement of 'Going Out'

Chinese enterprises 'going out' have become an emerging new global phenomenon, built on China's other successes. Over the past 30 years, China has achieved huge economic growth – primarily through a combination of exports, massive infrastructure building and gradual market liberalisation – culminating in the country's entry into the WTO in 2001. After a dozen years' development, China's global investment has increased at least 60-fold.²

Furthermore, in September 2013, during President Mr Xi Jinping's visit to Kazakhstan, he proposed an initiative in his speech that China and the central Asian countries build an 'economic belt along the Silk Road', a trans-Eurasian project stretching from the Pacific Ocean to the Baltic Sea.³ In October 2013, Xi Jinping proposed a new maritime silk road in his speech in Indonesia during his state visit. President Xi's proposal of the 'One Belt, One

Road' initiative is a significant signal that the government encourages foreign investment and trade. The 'One Belt, One Road' initiative concerns 65 countries and 4.4 billion people and is China's most important and strategic initiative. The initiative is part of the 'going out' strategy.⁴

Major Models of Overseas Investment In General

The practice of Chinese enterprises 'going out' has taken many different forms or models. The following models analysed in this article are popular among Chinese enterprises looking to make overseas investments.⁵

The Haier Model — Set up Manufacturing Shops in Foreign Countries

This model generally involves establishing workshops in foreign markets and directly manufacturing and selling products in the overseas markets. Under this model, the company projects a local employer image, strengthens its relationship with the local market and customers, and thus reduces trade barriers. Since 1996, Haier has opened a production facility in Indonesia, then Haier looked to make further inroads all over the world.

This model has also been practised by a Chinese domestic automobile industry, such as Chery Automobile. As a result of the consideration of transportation costs, taxation and delivery speed, Chery Automobile established dozens of manufacturing factories overseas to save costs and accelerate delivery speed; furthermore, localised products are a better fit in the local market. Now Chery is selling its products in over 80 countries all over the world.⁶

The Lenovo Model — Overseas Mergers and Acquisitions

Lenovo purchased the IBM PC Division in 2005 and has used its existing product lines and sales network to expand into the global market. This model shows that, by buying a well-known multinational division, the company effectively obtains a new ship and sails it out to sea. Lenovo's US\$1.75 billion to purchase the IBM PC Division made it the world's third-largest PC maker, and this purchase gave a huge boost to the going global image of China's firms. Then-Chairman of Lenovo, Yang Yuanqing, called this purchase an 'historic event' for the company. After this purchase, IBM took an 18.9 percent stake of Lenovo. Lenovo also obtained the right to be the preferred supplier of PCs to IBM and to be allowed



to use the IBM brand for five years under an agreement that included the 'Think' brand. By the end of 2007, Lenovo had successfully rebuilt its supply chain. By 2011, Lenovo became the second largest PC maker in the world. This model greatly enhanced an existing Chinese firm's global image, as well as its global network and distribution channels.⁷

Listed Overseas Model — Global IPO

The international IPO has been a major vehicle for Chinese companies to 'go global' in recent years. Several large Chinese enterprises, such as Alibaba, China Mobile, the ICBC and Sina.com, as well as many others, are now listed overseas. Alibaba was the largest IPO in the history of America and after listing in America, Alibaba received US\$25 billion from the global financial markets. This model has greatly improved the structures, performance, governance and global images of Chinese companies. Since Alibaba was listed overseas, it has received higher valuations by the markets. The global IPO model could help companies to expand into the international market more successfully. Chinese internet and high-tech industries have also benefited enormously from this model. Chinese high-tech firms going global through IPOs have not only received cash from international investors, but have also benefitted from operating and revenue models.⁸

Risk Control

Risk Assessment, Strategies and Control Systems

When companies are 'going out' to overseas markets, they should take into consideration all factors, including conducting a political, economic, social, technological, legal and environmental analysis to understand the risks, meanwhile formulating a risk mitigation strategy which consists of an integrated system especially setting up a legal risk control system. A risk control system is designed to minimise any existing and potential risks. The system should develop plans for executive protection, crisis management, emergency responses and security team training.⁹

Further, companies should improve their legal awareness by studying the relevant laws of the country and respect local religions, culture and customs, uphold corporate social responsibility and build a harmonious relationship with local residents.¹⁰

Comprehensive Deliberation on the Destination of Foreign Investment

When a company is to conduct its 'going out' project, it should first consider the advantages and disadvantages brought by the 'going out' and assess comprehensively whether the relevant cost of 'going out' can be borne by the company. Moreover, the company needs to analyse the current situation of public policies and market circumstances of the host state and analyse whether the cost can be recovered in the long-run. Second, whether the possible failure of 'going out' will induce a major adverse effect to the future existence of the company should be given attention as well. At the same time, the company should consider whether there is a reasonable solution for such risk and how long it would take for such solutions to restore the company to what it was previously, are also crucial issues. The company should make its final decision based on these comprehensive deliberations.¹¹

The international IPO has been a major vehicle for Chinese companies to 'go global'.



Completing a Legal Risk Management System

Legal risk avoidance cannot simply rely on setting up general legal counsel and a legal department. It is not solely a task of an in-house legal department, but it is also a necessary step to establish a complete risk management system. The risk management system should be integrated into every aspect of the company's internal management, which means that every department and its staff should be involved in such management led by the legal department.¹²

First, such management requires the establishment of basic regulations, including the basic principle of risk management and its objective and managing vehicle. The company should make it a basic principle to foresee the legal risks ahead of time and to correctively react to such risks and make it a basic managing objective to foresee the risks rather than remedy them after they have arisen. With respect to the arrangement of management organs, other than the general legal department, a specialised risk management committee is a possible solution, which is in charge of the legal risk and major risk management matters, including formulating the overall strategy.

Second, such management requires the establishment and enforcement of the legal risk management system. The aforesaid system normally consists of risk identification, risk assessment, risk handling, risk supervision and reporting. Regardless of which part is involved, it requires cooperation between the legal department and other business departments of the company. If there are diverse opinions among different departments, these opinions should generally be submitted to the general legal counsel and the leader of the relevant departments for negotiation.¹³

External Lawyer Engaged in Risk Management

External lawyers play a significant role in a company's legal risk management. Normally, a company must choose one or several law firms to establish a long-term relationship as its legal support during daily operations.

The in-house legal counsel, as well as the external lawyer, will both have their specific work and coordinate with each other. If the problem cannot be solved by the in-house counsel, the problem and the case can then proceed to the external lawyer.¹⁴

Conclusion

Enterprises should form a clear goal when conducting overseas investments and transactions and especially they need to be fully familiar with local laws, regulations and supervisory systems. Moreover, enterprises should establish a legal risk control system and additionally hire a professional legal firm as support as important steps to prevent and solve legal risks. Overseas investments and transactions are a challenge but also an opportunity and the enterprise should make all necessary preparations to meet the challenge and opportunity.

Notes:

- 1 Pinkerton, 'China's 'Going Out' Strategy: Increasing Overseas Expansion, available at <http://www.pinkerton.com/blog/chinas-going-out-strategy-increasing-overseas-expansion/> (retrieved 2014).
- 2 Huiyao Wan, *Ten Chinese Going Global Models: Emerging Patterns and Analysis*, Taylor and Francis Group Database (retrieved 2014).
- 3 Wu Jianmin, 'One Belt, One Road', *Far-reaching Initiative*, available at <http://www.chinausfocus.com/finance-economy/one-belt-and-one-road-far-reaching-initiative/> (retrieved 2015).
- 4 *Ibid.*
- 5 Huiyao Wan, n 2 above.
- 6 *Ibid.*
- 7 *Ibid.*
- 8 *Ibid.*
- 9 Pinkerton, n 1 above.
- 10 *Ibid.*
- 11 Anonymous, *Risk Management System of Transnational Corporation*, available at <http://www.legal-risk.cn/n5338c13.aspx> (retrieved 2015).
- 12 *Ibid.*
- 13 *Ibid.*
- 14 *Ibid.*



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Brief Introduction to the Recognition and Enforcement of Chinese Arbitration Awards in Italy

This article focuses on recognition and enforcement of Chinese Arbitration Awards in Italy and briefly provides practical guidance to limit risks to be trapped into the “*Nulla executio sine titulo*” due to a title not perfectly formed according to national and/or international laws.

Introduction

In the era of global economic downturns, corporate entities are undergoing major restructuring processes often undermined by cash flow and credit collection issues. These problems may become real nightmares for entrepreneurs and lawyers when it comes to foreign defendants, given the high chance that assets are located abroad. Generally speaking, plaintiffs rely on bilateral (or multilateral) treaty agreements between countries or international conventions which set forth rules and requirements for the recognition and enforcement of civil judgments and arbitration awards.

Understanding whether your state where the recognition and enforcement is sought is a contracting state of one of such agreements is of primary importance, and is essential to avoid being left in a position of having a well-crafted favourable judgment, but without any real effect. The aim of this article is to address the legal basis and procedure to enforce a Chinese arbitral award in Italy and, where possible, provide a judicial interpretation and practical approach to the matter.

The legal ground to enforce an arbitration award granted by a Chinese arbitral committee in Italy is provided by the Treaty of Judicial Assistance on Civil Affairs between the People's Republic of China and the Republic of Italy (the 'Treaty') signed on 20 May 1991, by which Italian and Chinese citizens enjoy the same judicial rights, including but not limited to the right to access the judicial authorities of the other party as if they were in their own country.¹

Regarding the terms and conditions for obtaining such judicial assistance of an arbitral award, Article 6, Article 20 and the articles of Title III² provide valuable guidance on the requirements, supporting documents, applicable law and circumstances for refusal. Specifically, the Treaty applies upon a party's request for recognition of civil decisions, including arbitration awards, issued by one party's judicial authority to be recognised and enforced in the other party's jurisdiction. Title III of the Treaty describes the reasons for denial of recognition such as:



- (1) the judicial authority which issued the judgment has no jurisdiction under the criteria set forth in Article 22;
- (2) the judgment is not final (raising issues of *res judicata*) according to the law of the place where the judgment is rendered;
- (3) the losing party was not given adequate notice of the proceeding in the event of default judgment or an impaired party wasn't duly represented according to the law of the place where the judgment was rendered;
- (4) another final judgment between the same parties and on the same subject matter has been pronounced by the court of the place where recognition is sought or has been recognised by the said authority if pronounced in a third country;
- (5) a civil proceeding for the same subject matter is pending between the same parties before the court of the place where recognition is being sought, and that lawsuit was initiated prior to the action instituting the proceeding before the court which gave the judgment of which recognition is sought; and,
- (6) the judgment contains provisions that harm the sovereignty or security of the place in which recognition is requested or that are against the public policy of the said place.



Jurisdiction

When it comes to defining which judicial authority has the power to issue a recognisable and enforceable award according to the Treaty, Article 22 provides, *inter alia*, the relevant rules as follows:

- (1) the defendant expressly gave its consent to the jurisdiction of that judicial authority;
- (2) the defendant failed to raise objection to the court's jurisdiction and proceeded to defend the lawsuit on its merits; and,
- (3) in a contractual dispute, if such contract has been concluded or has been or ought to have been carried out in the territory within the jurisdiction of the court that issued the judgment or the subject matter of the dispute is located or arose within that territory.

Supporting Documents

Regarding the documentation, Article 24 of the Treaty states that the party who wants to apply for recognition and enforcement of an arbitration award rendered in the other party's jurisdiction should submit the following documents:

- (1) a certified copy of the judgment;
- (2) proof that the judgment is final and binding, unless it is clearly specified by the judgment itself;
- (3) evidence that the notice was duly served on the defendant, unless it is clearly specified by the judgment itself;
- (4) proof that any impaired defendant was duly represented, unless it is clearly specified by the judgment itself; and,
- (5) an official translation of the judgment and the documents mentioned in items (1)-(4) above in the language of the place where recognition is sought.

Applicable Law

The Treaty has general provisions for the recognition of arbitration awards in both countries; however, it does not enter into details regarding the procedure to gain such recognition, and thus it leaves it to each party to apply its own law in this regard. That is to say, when it comes to recognising a Chinese arbitration award,

an Italian judicial authority shall apply its own law. However, it is worth noting that the judicial authority appointed for recognition and enforcement shall limit its discretion on whether conditions of the Treaty have been satisfied or not, without entering into the merit of the dispute. Furthermore, the Treaty explicitly states that arbitral awards made in the territory of one party shall be recognised and declared enforceable in the territory of the other party in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'Convention') of 10 June 1958.

The New York Convention and the Italian Civil Procedure Code

China and Italy are parties to the Convention and the process for gaining recognition of a Chinese arbitral decision in Italy involves systematic application of both the Convention and the Italian Civil Procedure Code (the 'Code'). In 1994 Italian lawmakers implemented Chapter VII of Convention, within Title VIII of the Code through the issuance of the Law n. 25/1994 regarding "new provisions on arbitration and regulations on international arbitration", specifically repealing Article 800 and adding two new articles: Article 839 and 840.

In relation to initiating the recognition procedure of a foreign arbitration award in Italy, a party shall submit a petition to the President of the Court of Appeals competent in the place in which the other party is resident. If that other party does not reside in Italy, the Court of Appeals of Rome shall have jurisdiction.³ As per Article 839 of the Code, at the time of application the party who applies for recognition and enforcement shall submit:

- (1) the original award or a duly certified copy thereof; and,
- (2) the original agreement on arbitration or contract containing the arbitration clause or a duly certified copy thereof or any other document of the same value.

However, the Italian Supreme Court in Ruling 24856/2008 clarified that given Article IV of the Convention specifies that such original award shall be authenticated, in case the applicant submits only the original document, the Court of Appeal shall dismiss the

request. It is worth noting that the party has the right to start a new recognition proceeding after obtaining relevant authentication given the fact that the court dismissal is on procedure and will not constitute *res judicata*. Furthermore, the Supreme Court in Ruling 17291/2009 explained that requirements in Article IV of the Convention and Article 839 of the Code shall be considered not just a condition of the action, but a precondition for the establishment and validity of the proceeding. Hence, the applicant shall provide complete documentation at the very beginning (that is, together with the application for recognition), and not during the eventual opposition phase.

The definition of authentication of the original award has been clarified by various rulings issued by the Supreme Court such as n. 2919/1995 by which, based on the Convention, this process of authentication shall follow the rules of the country in which recognition is sought. In Italy, authentication formalities are provided for by various laws among which Article 72 of the Law 89 of 1913 requires authentication of every signature on the document and not only some of them. Verification of compliance with that requirement will be done by the court directly, regardless of any assertions, defenses or arguments by the opposing party.

Applying this principle to reality, in the case of an arbitral award issued by more than one arbitrator, the applicant shall seek authentication of the signature of each arbitrator involved in the dispute or the recognition procedure will be dismissed by the court. In addition, it is noted that a certified translation in Italian of the said documents shall also be provided in cases where they were issued in another language (for example, Chinese or English).

Generally speaking, the procedure for approval of recognition is focused on the above formal requirements rather than the merits. However, in the case that the President of the Court of Appeals finds that the dispute cannot be the subject of arbitration under Italian law or the award violates the public order, the court shall refuse recognition. Approval is granted by Presidential Decree issued *inaudita altera parte*, which means without attendance of the parties. It is worth noting that such decree contains the double function of recognition and enforceability of the award without requiring any additional statement or declaration from the court.⁴

Opposition Procedure

In spite of adhering to the above procedures and having a judicial decree of recognition in a timely manner, the party seeking enforcement may encounter an obstacle if the other party files an opposition within 30 days from the day of publication of the decree. Article 840 of the Code governs such opposition phase, which involves an ordinary trial that ends with a judgment that might be appealed by the parties to the Supreme Court only.

The grounds on which the other party can raise an opposition are listed both in Article V of the Convention and in Article 840 of the Code, such as:

- (1) the parties were incapable or the agreement (or the arbitration clause) is not valid under the applicable law agreed by the parties or if the latter was not specified, under the law of the country where the award was made;
- (2) the losing party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to defend itself;
- (3) the award deals with matters not covered by the terms of the arbitration agreement or clause, or it contains decisions on matters beyond the scope of the said agreement, provided that, if the decisions on matters agreed to be submitted to arbitration can be separated from those not so agreed, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- (4) the composition of the arbitration committee or the arbitration procedure violate the agreement of the parties, or, in the absence thereof, violate the law of the country in which the award has been issued; or,
- (5) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was issued.

Furthermore, as already mentioned, recognition and enforcement of an arbitration award may also be refused if the competent court believes that the subject matter of the dispute can't be settle by arbitration under its own law or the recognition and enforcement of the award is contrary to the public order of the country.

Even though Article 840 of the Code was issued by Italian lawmakers for the purpose of conforming Italian legislation with international practice, it slightly varies from the provisions of Article V of the Convention. Specifically, while Article V(e) of the Convention gives to the courts the right to refuse the recognition and enforcement of the award if it has not become final and binding upon the parties or has been set aside or suspended by a competent authority, Article 840, paragraph 3 of the Code requires refusal of recognition under such circumstances.



The court may apply precautionary measures, including property preservation, against the opposing party's assets.

Regarding provisional enforcement of a foreign award in Italy, although the text of Articles 839 and 840 of the Code theoretically deny it until expiration of the term to file or decision upon the opposition, in recent practice enforcements during the opposition procedure, or in some cases even before an opposition is filed, have been witnessed. However, in order to avoid a so-called automatic provisional enforcement that could jeopardise the rights of the party, Article 649 of the Code provides a remedy to such outcome given the right to the opposing party to ask for a suspension of provisional enforcement in case of 'serious reasons', such as irreparable harm resulting from immediate execution of the award or high chances that the opposition will succeed. Notwithstanding the above, the Code seems to permit provisional enforcement of a foreign award in the case the opposing party fails to provide written evidence or a readily available solution capable of preventing the provisional enforcement, or in other words, if the opposing party's suspension fails.

However, practically speaking it seems unlikely to have provisional enforcement pending terms for opposition. In accordance with this theory, the Court of Appeals of Milan issued a measure on 12 July 1995 clarifying that in such circumstances, principles of international conventions on the enforcement of foreign judgments in civil and commercial matters shall apply. That is to say, in case of opposition, the court shall suspend the enforcement until conclusion of the opposition procedure.

It is worth noting that pending the terms for opposition and during the opposition process itself, upon request of the party, the court may apply precautionary measures, including property preservation, against the opposing party's assets. In this way, even though the requesting party may not satisfy its claim through a provisional enforcement immediately, the court can still safeguard the latter's interests.

In the case there is no opposition to recognition, or the opposition is dismissed by the court, the enforcement procedure in accordance with Italian Law may begin.

Conclusion

Based on the above, it can be concluded that recognition and enforcement of Chinese arbitration awards in Italy can be achieved without particular limits

or obstacles by a party holding a legitimate award. Of course, the award has to match certain conditions as per the New York Convention and bilateral agreements and also be in line with the receiving country's public policy. Under those regulations, the requesting party may also seek property preservation in order to safeguard its interests and avoid surprises from misappropriation of assets by a debtor. However, it is worth noting that this procedure is not automatic and requires preparation of certain documents in both countries, thus assistance and cooperation between lawyers in both jurisdictions from the very first stage is suggested.

Notes:

- 1 Art 2 of the 'Trattato per l'assistenza giudiziaria in materia civile', Beijing, 20 May 1991– Italian Law. n. 199 of 4 March 1994 – G.U. 71 of 26 April 1994.
- 2 Treaty, Arts 21-28.
- 3 Code, Art 839.
- 4 *Ibid*, Art 839, para 4,



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The Trade Negotiation Capacity Gap in Free Trade Agreement Negotiations: The Role of Government, Corporate and Private Counsel in Assisting LDCs and DCs

Developing Countries ('DCs') and particularly, Least Developed Countries ('LDCs'), historically have not been capable of fully informed participation in multilateral, regional or bi-lateral free trade agreement ('FTA') negotiations.¹ The reason is due to what the United Nations ('UN'), among other international organisations, and many NGOs have called a 'trade negotiation capacity gap.'² This gap has traditionally been caused by a number of factors, including among others: (1) the complexity of FTAs, which have an increasingly broad scope and ever-deeper technical nature;³ (2) disputes among negotiating partners, largely driven by their parochial national concerns and domestic political dynamics that cause them to put short-term gains above long-term economic and strategic interests;⁴ and (3) perhaps most importantly, the lack of substantively meaningful training opportunities available to trade negotiators from the LDCs and DCs. If not remedied, these challenges will be exacerbated as a result of the proliferation of regional and bilateral FTAs due to the failure to conclude the most recent multilateral FTA, the Doha Round FTA. The Doha Round, after 15 years of negotiations, was finally declared dead in December 2015. Our purpose in this article is to articulate a practical solution and to help define the role of counsel in this effort.

Historical Perspective

Perhaps the *de facto* origin of multilateral FTAs can be traced to the late Nineteenth Century when trade was the engine of economic growth. During this period, countries dropped their restrictions on trade, while the Gold Standard was used worldwide to measure the value of goods and currencies, providing a universal currency.⁵ After the 1929 Wall Street crash, the world reverted to protectionism, which in part led to a worldwide depression.⁶ Trade fell even faster, causing more unemployment and prolonging the downturn.⁷ After two world wars, most of Europe and Japan were struggling economically and nations became dependent on the revival of world trade for vital income. The United States, which had used World War II as a means of economic revival,⁸ was economically dominant and was under pressure to open up its markets to other countries.

Following the end of World War II, finance ministers from the Allied nations gathered at the Bretton Woods Conference to discuss the failings of World War I's Versailles Treaty and to create a new international monetary system that would support postwar reconstruction, economic stability, and peace.⁹ The Bretton Woods Conference produced two of the most important international economic institutions of the postwar period: the International Monetary Fund ('IMF') and the International Bank for Reconstruction and Development (now called the World Bank, its successor organisation).¹⁰ Recognising that the restrictive tariff policies of the early 1930s had contributed to the environment that led to World War II, in the late 1940s representatives of the Allied nations convened with representatives of other major nations to design a postwar international trading system that would parallel the international monetary system.¹¹ The objectives of these meetings were to draft a charter to create the International Trade Organization ('ITO'), and to negotiate the rules governing international trade and reductions in tariffs under the ITO. Although a charter was drafted, the ITO never came into being due to lack of support by the US Congress.¹²

While the US Congress failed to support the ITO, it gave the US president the authority to negotiate a treaty governing international trade by extending the 1934 Reciprocal Trade Agreements Act ('RTAA').¹³ This led to the establishment of the General Agreement on Tariffs and Trade ('GATT') in 1947.¹⁴ The GATT was perhaps the first truly multilateral FTA, a treaty whereby 23 member



countries agreed to a set of rules to govern trade with one another and maintained reduced import tariffs among its contracting parties.¹⁵ The GATT treaty did not provide for a formal institution and lacked enforcement authority. However, a Secretariat with limited institutional apparatus was eventually created to administer various problems and complaints that might arise among members.¹⁶

Over the following 40 years, GATT grew in membership and in its success at reducing trade barriers.¹⁷ GATT members regularly met in what came to be known as negotiating rounds. Although these rounds initially focused on negotiating further the reductions in the maximum tariffs that countries could impose on imports from GATT members, later negotiation rounds began focusing on non-tariff issues such as antidumping, intellectual property, government subsidies, etc.¹⁸

With the increase in participation and the fact that the negotiating topics are getting more complex, negotiating multilateral trade agreements and policies has become more complicated. Increasingly, this has placed most DCs and LDCs at a disadvantage because most lack the trade negotiating capacity to fully participate in such negotiations on an informed basis.¹⁹ The first of these later rounds focusing on non-tariff issues, the Kennedy Round, was plagued with delays and slow progress. Disputes arose over agricultural policy and tariff disparities.²⁰ Furthermore, it was the first round to introduce linear-style negotiations, in contrast to the nonlinear, item-by-item

By the late 1980s,
several problems
emerged that
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negotiations of previous GATT rounds.²¹ This led to tensions during the negotiations of major issues, as Developed Countries preferred the linear, across-the-board tariff cuts rather than the nonlinear, item-by-item negotiation favoured by LDCs and DCs.²²

By the late 1980s, several problems emerged that previous rounds of GATT did not address. Specifically, the dispute resolution mechanism of GATT was not functioning as effectively as had been hoped and countries with longstanding disagreements were unable to reach any sort of resolution on a number of issues, ranging from government subsidies for exports to regulations regarding foreign direct investment.²³ Similarly, a number of commodities, such as agricultural products and textiles, were exempted from GATT.²⁴ Further, GATT had no rules regarding trade in services; intellectual property; unfair trade practices such as antidumping duties, voluntary export restraints and countervailing duties; and rules regarding trade-related investment measures such as domestic purchase requirements for plants built from foreign direct investments.²⁵

To address these problems, a new round of trade negotiations, the Uruguay Round, was launched and it sought to introduce major reforms into how the world trading system would function.²⁶ It also promised to generate significant welfare benefits for all countries through the strengthening of the Multilateral Trade System ('MTS')²⁷ and expanded GATT's authority to new areas such as agreements regarding trade in textiles,

agriculture, services, and intellectual property; and rules regarding administered protection.²⁸ Despite its successes, the Uruguay Round failed to address some of the major issues of concern to DCs and LDCs. These issues include: issues related to the elimination of tariff and non-tariff barriers for products of interest to LDCs; the phasing-out of subsidies and trade-distorting domestic farm supports in the developed countries; and the implications of the Agreement on Trade-related Intellectual Property Rights ('TRIPS') on public health.²⁹ In a speech at the World Bank after the conclusion of the Uruguay Round, renowned Indian Economist Jagdish Baghwati criticised the Uruguay Round as having been dominated by the Developed Countries with only the scheduled phase out of the Multi-Fibre Agreement on apparel and textile quotas being for the benefit of the LDCs.³⁰ Even here, the most significant changes are being back-loaded toward the end of a 10-year schedule.³¹

The most recent of the multilateral negotiation rounds, the Doha Development Agenda, sought to address these concerns in addition to continuing the tradition of lowering trade barriers.³² However, the Doha Round failed again to effectively address these concerns, despite DCs and LDCs actively participating by identifying and pursuing their interests.³³ In the 2008 ministerial meetings, progress in negotiations stalled after the breakdown of negotiations over disagreements concerning agriculture, industrial tariffs and non-tariff barriers, services, and trade remedies.³⁴ The most significant of these differences involved agricultural subsidies provided by the major developed nations to their domestic market.³⁵ These subsidies were seen to operate effectively as trade barriers.³⁶

Since the breakdown of negotiations in 2008, there were repeated attempts to revive the Doha Rounds talks without success.³⁷ Intense negotiations, mostly between the United States, China, and India were held to address the inability to conclude this round of trade negotiations. These ministerial meetings were not successful because neither developed economies like the United States and the European Union nor developing countries like China and India were willing or able to make fundamental concessions.³⁸ After 14 years of talks, and at the most recent WTO ministerial meeting held in Nairobi, Kenya in December 2015, trade ministers from more than 160 countries failed to agree to keep the negotiations going,³⁹ effectively ending the Doha Round of negotiations.⁴⁰

Trade Negotiation Capacity Gap

Predictably, the failures to conclude a multilateral FTA since the Uruguay Round has led to a proliferation of regional and bilateral FTA negotiations and agreements. While bilateral and regional FTAs focusing on specific issues are easier to negotiate, they cannot cover the broader issues that a multilateral FTA addresses (see Chart 1 below). Further, the sheer number of bilateral and regional FTAs negotiations is a burden in itself and the knowledge of technical and legal issues, which such FTAs negotiations now require, presents a formidable challenge to trade negotiators⁴¹ (see Chart 2 right). The procedures involved in the negotiation process, for example, have become quite complex and negotiators are now expected to consult with many stakeholders, both before and during the negotiations.⁴² This is an added burden given that the subject matter covered varies from one FTA to another and many recent FTAs have included provisions on a wide range of issues.⁴³

Chart 1: 10+ Parties: 300+ Issue Positions

30 chapters – 26 Annexes & Schedules

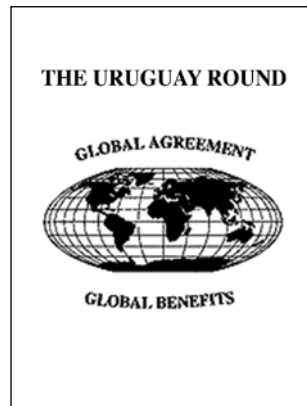
- Trade in Goods
- Textiles
- Services
- Investment
- Labor
- Environment
- E-Commerce and Telecommunications
- Competition Policy and State-Owned Enterprises
- Small- and Medium-Sized Enterprises
- Technical Barriers to Trade and Sanitary and Phytosanitary Measures
- Transparency and Anticorruption
- Customs, Trade Facilitation, and Rules of Origin
- Government Procurement
- Development and Trade Capacity Building
- Dispute Settlement
- US-Japan Bilateral Negotiations on Motor Vehicle Trade and Non-Tariff Measures

Chart 2: 100+ Parties: 6000+ Issue Positions

The GATT 1994, and a list of about 60 agreements, annexes, decisions, and understandings.

Simple structure with six main parts.

- An umbrella agreement (the Agreement Establishing the WTO);
- Goods and investment (the Multilateral Agreements on Trade in Goods including the GATT 1994 and the Trade Related Investment Measures (TRIMS));
- Services (General Agreement on Trade in Services (GATS));
- Intellectual property (Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS));
- Dispute settlement (DSU);
- Reviews of governments' trade policies (TPRM)



The results of a lack of capacity building have harmed DCs and LDCs. With respect to DCs and LDCs in Africa, for example, a 2010 report by the UN Conference on Trade and Development ('UNCTAD') stated, 'The capacity building needs of governments and other stakeholders involved in the formation of trade policies and negotiating positions for the African LDCs are far from fully being met.'⁴⁴ Similarly, in a paper published by the African Capacity Building Foundation, Professor Plummer argued:

Opening markets and building capacity to profit from them are essential to the economic future of Africa.

But doing this is much easier said than done: As markets are liberalised and trade-distorting subsidies are reformed, well-trained policy negotiators supported by efficient technical staff and thoughtful policy stances that articulate the needs of the country and think through strategies to advance national objectives are necessary to maximize the benefits of economic reform⁴⁵ (see Chart 3 below).

Not only does the lack of capacity building harm DCs and LDCs in Africa, but also this inability to fully participate in multilateral FTAs has negatively affected DCs and LDCs in other regions of the world. In a working paper developed by the Centre for Policy Dialogue ('CPD') on Trade Related Research and Policy Development ('TRRPD'), Debapriya Bhattacharya, the Centre's director, identified the information and knowledge needed by Asian LDCs to effectively participate in multilateral FTAs.⁴⁶ Debapriya Bhattacharya argued:

The growing number of bilateral and regional trade initiatives, combined with the increasing number of issues being addressed in multilateral trade negotiations ... requires that LDCs in Asia and the Pacific build additional negotiating capacity ... in order to more effectively underscore their concerns and interests in a body dominated by both economically and politically powerful trading nations. Their recent experience has shown in part that they

have a long ways to go, particularly in the area of trade negotiations.⁴⁷

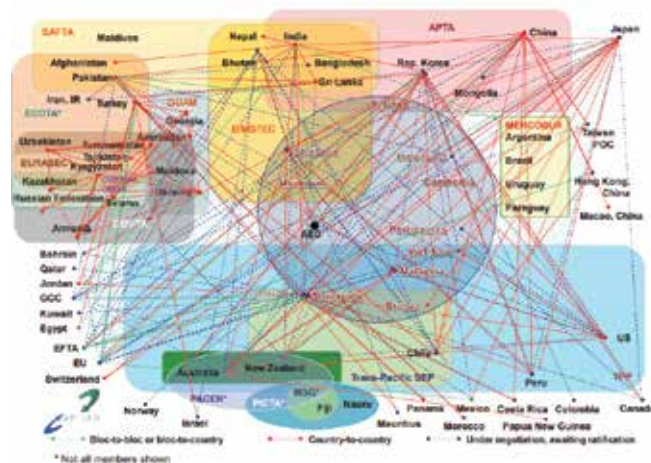
The dilemma facing DCs and LDCs is obvious. Namely, countries that cannot afford to develop a cadre of trade negotiators, such as those within the Office of the US Trade Representative or the European Commission, must rely on outside companies to help them retain counsel for assistance and advice. But DCs and particularly the LDCs are unlikely to have such resources available to them. So it came as no surprise that a 2004 Doha Round Background Paper explained what is needed as follows:

Resources ... need to be provided in developing countries to support the development of such a national pool of experts through institutional linkages and training programmes between relevant government agencies, the domestic academe and the domestic private sector and civil society The financial resources required for such preparations can be sourced internally or externally.⁴⁸

While some assistance is available for WTO members in Geneva and for Organization of American States ('OAS') members in Washington, DC, it is an expensive proposition to send government officials to partake in such training. Similarly, the international development agencies such as the UNIDO and the World Bank do provide some funds to hire consultants. For example, the State Planning &

Chart 3: Post-Uruguay Round Regional and Bilateral FTAs: 39 and over 12,000 Issue Positions

- NAFTA
- MERCUSOR
- ASEAN
- FTAAP
- ASEAN+6
- EU-MEFTA
- PACER and PACER Plus





International development agencies such as the UNIDO and the World Bank do provide some funds to hire consultants.

Development Committee of China retained 53 lawyers and consultants (including Bruce Aitken, co-author of this article) to assist them in the late 1990s with WTO accession. However, these contracts and scope of work are limited.⁴⁹ In the last decade, some efforts have been made to address the trade negotiation capacity gap by national governments, international organisations and at the university level. The Australian government and Asian Development Bank hosted trade negotiation workshops in 2004 and 2008 respectively. Similarly in 2004, at the request of Dean Claudio Grossman, American University's Washington College of Law launched the first ever law school training programme for trade negotiators in their Masters of Law Programme. It included six courses written by Mr Aitken. Today, this kind of initiative also has been taken up in other venues, such as the University of Kansas School of Law.⁵⁰ While such initiatives have been helpful, they are clearly not enough in solving the serious problem of trade negotiation capacity gap. Furthermore, the expense of participation in these training is significant.

The Challenge of the Shifting Politics of Trade and FTA Negotiation

In the 2016 US Presidential election, both candidates disavowed the Trans Pacific Partnership Regional FTA.

President-elect Trump's full intentions in this regard remain to be seen. Meanwhile, the shift towards China of such long-time US allies as Malaysia and the Philippines, illustrate the complexity of the FTA situation. As competing bilateral and regional FTAs further proliferate, the challenges facing LDCs and DCs will only become greater. This, in turn, increases the importance of such entities as the TNTC.

The Trade Negotiation Capacity Building Center

There remains a serious trade negotiation capacity gap between the LDCs and DCs on one hand, and the developed countries on the other hand, due to the lack of substantively meaningful training opportunities available to the trade negotiators from the LDCs and DCs. If not remedied, these challenges will be exacerbated as a result of the proliferation of regional and bilateral FTAs due to the failure to conclude the most recent multilateral FTA, the Doha Round FTA. Accordingly, at the April 2016 IPBA Annual Meeting and Conference, The Trade Negotiations Training Center ('TNTC') was launched. It was organised by Mr Aitken with the help of Ambassador Kim, Mr Fonkem (also a co-author) and others. The TNTC currently is actively sourcing

funds for multiple annual in-depth training sessions and the establishment of a Think Tank to track and make simplified explanations available to DCs and LDCs on current and further FTAs. Among other such sources, we are seeking assistance from international development agencies for the TNTC. This can and should be done in concert with local law or business schools and interested partners,⁵¹ as suggested by the UNCTAD. We also anticipate involving leading international law firms to provide sector expertise in subject matter areas to be covered in TNTC training, such as foreign investment, intellectual property, taxation, etc.

The proposed (TNTC) would focus on training legal professionals; trade policy officials; members of the international business, IGO, and NGO communities; academics; and others within the DCs and LDCs. In the first instance, it would focus on training government officials. It would offer an intensive professional and practical development programme on WTO law and policy, with particular focus on utilising customised training workshops that effectively model the processes of trade negotiations within the ministerial rounds of trade negotiations. The goal here would be to immerse the participants in an ideal-type setting of trade negotiations. In addition to these customised training workshops, the proposed TNTC would also monitor and report on the various ongoing developments of all the FTAs being negotiated. As such, it would serve as a go-to resource knowledge centre, and it could evolve into a centre that also focuses on, and explains, WTO developments with an impact on LDCs and DCs.

Notes:

- 1 Aitken, Bruce and Fonkem, Ngosong, 'The Trans-Pacific Partnership: Progress, Challenges & a Proposal for ASEAN', *Inter-Pacific Bar Association Journal*, December 2014, available at https://ipba.org/media/normal/1694_IPBAJournalDec2014.pdf.
- 2 WTO, 'Building Trade Capacity', available at https://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm; APEC's Capacity Building Activities, available at http://www.apec.org/~media/Files/Press/NewsRelease/2003/03_cti_wto_capbldg.pdf.
- 3 Progress in negotiations stalled after the breakdown of the July 2008 negotiations over disagreements concerning agriculture, industrial tariffs and non-tariff barriers, services and trade remedies. There was also considerable contention against and between the EU and the USA over their maintenance of agricultural subsidies—seen to operate effectively as trade barriers. See Hanrahan, Charles and Randy Schnepf (22 January 2007), 'WTO Doha Round: The Agricultural Negotiations', Congressional Research Services (Retrieved 15 March 2016).
- 4 For example, the recently concluded Regional FTA called the Trans Pacific Partnership ('TPP') took a decade and more than 33 sets of negotiations, including nearly half as many Ministerial Sessions. Among the obstacles they faced were the seeming intransigence by the Governments of Japan and the United States over, respectively, protection of rice farmers and light truck manufacturers. Further, other participating TPP negotiating countries raised their own concerns, including, among others, Australia and New Zealand seeking greater market access for their dairy product exports and Vietnam's desire for greater market access for its exports of footwear and textiles. Also complicating the process of negotiating FTAs is the realisation by trade negotiators that FTAs must be implemented in their own countries. In the United States, e.g., this process is complicated by the 2016 Presidential election and related politics. The historic bipartisan consensus in favour of trade liberalisation, manifest in the Administrations of Presidents Roosevelt, Eisenhower, Kennedy, Johnson, Nixon, Carter, Reagan and Bush, is dead. It has been dead since roughly the 1990s, following the passage of implementing legislation for the Uruguay Round and NAFTA. See Aitken, Bruce and Fonkem, Ngosong, n 1 above.
- 5 Drummond, Ian M, *The Gold Standard and the International Monetary System 1900–1939* (1987, Macmillan Education, LTD).
- 6 Irwin, Douglas A, *From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s* (1998, University of Chicago Press), available at <http://www.nber.org/chapters/c6899>; Milder, Mark, 'Parade of Protection: A Survey of the European Reaction to the Passage of the Smoot-Hawley Tariff Act of 1930', available at <http://business.uni.edu/economics/themes/milder.pdf>. The Smoot-Hawley Tariff Act of 1930 was the highest US tariff of the century and sparked massive foreign protest and trade retaliatory measures from major European nations and Canada. Smoot-Hawley did not cause the Great Depression, but it worsened it by initiating a wave of trade barriers that severely reduced world trade. For example, Canada retaliated by imposing new tariffs on 16 products that accounted altogether for around 30% of US exports to Canada. Canada later also forged closer economic links with Great Britain. France and Britain protested and developed new trade partners.
- 7 *Ibid.*
- 8 Aitken, Bruce and Fonkem, Ngosong, n 1 above. During World War II, the US shipped military equipment and a host of other supplies to both Asia and Europe.
- 9 Brookings Institute, 'The WTO and GATT: A Principled History', available at http://www.brookings.edu/~media/press/books/2009/selfenforcingtrade/selfenforcingtrade_chapter.pdf; Crowley, Meredith, 'An introduction to the WTO and GATT', Federal Reserve Bank of Chicago. See also the WTO webpage at www.wto.org.
- 10 *Ibid.*
- 11 *Ibid.*
- 12 See the WTO webpage at www.wto.org; Miller, James N, 'Origins of the GATT—British Resistance to American Multilateralism', available at <http://www.levyinstitute.org/pubs/wp/318.pdf>.
- 13 Hoekman, BM and Kostecki, MM, *The Political Economy of the World Trading System: from GATT to the WTO* (1995, Oxford: Oxford University Press) p 301, available at <http://www.eolss.net/sample-chapters/c14/e1-44-03-05.pdf>. They provide a good history of the post-WWII world trading system.
- 14 *Ibid.*
- 15 www.wto.com; https://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm; and as to US Trade Policy since 1934, see https://www.usitc.gov/publications/332/us_trade_policy_since1934_ir6_pub4094.pdf.
- 16 www.wto.com.
- 17 Love, Patrick and Lattimore, Ralph, 'Protectionism? Tariffs and Other Barriers to Trade', in *International Trade: Free, Fair and Open?* (2009, OECD Publishing), available at <http://dx.doi.org/10.1787/9789264060265-5-en>; https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.
- 18 https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

- 19 Aitken, Bruce and Fonkem, Ngosong, n 1 above.
- 20 The Kennedy Round, available at https://en.wikipedia.org/wiki/Kennedy_Round.
- 21 *Ibid.*
- 22 Norwood, Bernard, 'The Kennedy Round: A Try at Linear Trade Negotiation', *Journal of Law and Economics*, Vol 12, No 2 (October 1969), pp 297–319.
- 23 Crowley, Meredith, n 9 above.
- 24 Roshani M, Gunewardene, 'GA and the Developing World: is a New Principle of Trade Liberalization Needed?', 15 *Md. J. Int'l L.* 45 (1991), available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1333&context=mjil>.
- 25 Crowley, Meredith, n 9 above.
- 26 The Uruguay Rounds), available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm; https://en.wikipedia.org/wiki/Uruguay_Round.
- 27 *Ibid*; 'The Uruguay Round of Trade Negotiation: An overview', available at <https://www.bostonfed.org/economic/neer/neer1995/neer395a.pdf>.
- 28 *Ibid.*
- 29 *Ibid.*
- 30 Arvind Panagariya, 'On the "Extravagant" Predictions of Benefits from the Uruguay Round', *Economic Times*, 25 August 1999, available at <http://www.columbia.edu/~ap2231/ET/et-03-aug99.htm>.
- 31 *Ibid.*
- 32 The Doha Round, available at https://www.wto.org/english/tratop_e/dda_e/dda_e.htm.
- 33 Debapriya, Bhattacharya, 'Least Developed Countries in Trade Negotiations: Planning Process and Information Needs', *Centre for Policy Dialogue*, September 2005, Paper 52, available at http://www.cpd.org.bd/pub_attach/op52.pdf.
- 34 <http://www.meti.go.jp/english/report/downloadfiles/2008/WhitePaper/4-2.pdf>.
- 35 Doha Round: what are they negotiating? , available at https://www.wto.org/english/tratop_e/dda_e/update_e.htm.
- 36 *Ibid.*
- 37 'The Cancun Challenge'm *The Economist*, 4 September 2003. Retrieved 3 August 2008. In 2008, e.g., several countries called for negotiations to start again. Luiz Inacio Da Silver, former president of Brazil, called several countries leaders to urge them to renew negotiations. The director-general and chair of the Trade Negotiations Committee Pascal Lley My visited India to discuss possible solutions to the impasse.
- 38 Srinivasan, TN, 'The Future of the Global Trading System Doha Round, Cancún Ministerial and Beyond.' , available at <http://www.econ.yale.edu/~srinivas/Future%20of%20the%20Global%20Trading%20System.pdf>.
- 39 Donnan, Shawn, 'Trade talks lead to 'death of Doha and birth of new WTO''. *Financial Times*, 20 December 2011, available at. <http://www.ft.com/intl/cms/s/0/97e8525e-a740-11e5-9700-2b669a5aeb83.html#axzz424VtwH9j>.
- 40 *Ibid.*
- 41 According to the WTO, as of 1 February this year, there are 419 FTAs in force in the world, three FTAs signed and another 35 FTAs under negotiation: see <https://www.wto.org>.
- 42 During the most recent regional FTA, the TPP, the trade negotiators had to consult, among others, with agricultural producers and farming associations, chambers of commerce and industry, consumer bodies, importer and exporter associations, industry associations, intellectual property associations, various interest groups, professional associations, and standards setting bodies, to name a few. See https://en.wikipedia.org/wiki/Trans-Pacific_Partnership.
- 43 The TPP agreement, e.g., contains 30 chapters: see <https://ustr.gov/tpp/>.
- 44 UNCTAD, *Trade Negotiations and Africa Series: No 2 Trade Capacity Development For Africa: Compendium of Papers*, 2010, available at http://unctad.org/en/Docs/ditctncd20051_en.pdf.
- 45 Plummer, Michael, 'Areas of Focus of Capacity Building Interventions in Trade Policy Development and Trade Negotiations in Africa over the Medium Term, 2007–2011'. *African Capacity Building Foundation*,



The TNC currently is actively sourcing funds for multiple annual in-depth training sessions.

September 2007, available at <http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH014f.dir/doc.pdf>.

46 Debapriya, Bhattacharya. n 33 above.

47 *Ibid.*

48 Doha Round. Strengthening Developing Countries Capacity For Trade Negotiation: Matching Technical Assistance to Negotiation Capacity Constraints, December 2004, available at http://www.g77.org/doha/Doha-BP04%20-Strengthening_Southern_trade-related_negotiating_capacity.pdf.

49 WTO, 'The Accession Process—the Procedures and How They Have Been Applied', available at https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s6p1_e.htm.

50 <http://law.ku.edu/international-comparative-law>.

51 Ambassador Kim's International Trade Institute ('ITI') and the Global Development Law and Consulting Group ('GDLG') have been taking a leadership role in this endeavour. The GDLG, based in Washington, DC, and the ITI, based in Seoul, have created a structure that includes 'Anchor Schools' to provide assistance by way of training venues and student interns for basic research. We also plan to outreach to key international law firms for assistance with technical issues and also to multinational corporations for help in assessing the potential economic impact, sector by sector, of various elements of FTAs. As to the Anchor Schools, we have contacted Korean Universities to assist ITI in its anticipated role as Asian Secretariat for the TNTC. Similarly, we have contacted the University of Kansas Law School to assist the GDLG in its role as North American Secretariat for the TNTC. And we have received a pledge of training facilities for possible seminars in Washington, DC from American University's Washington College of Law. Finally, we have contacted the Asian Development Bank and ASEAN for financial assistance and plan to also outreach to other international development agencies. For further information, contact us via beatken@aikenberlin.com or cskim@leeinternational.com.



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Arbitrating in Singapore — The 2016 SIAC Rules

The revised Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') entered into force on 1 August 2016. Unless otherwise agreed by the parties, the 2016 SIAC Rules apply to any arbitration subject to the SIAC Rules commenced on or after 1 August 2016. With this latest revision, SIAC has aligned its arbitration rules with the most prominent sets of arbitration rules around the globe. In particular, it successfully tackles the growing complexity of disputes that are submitted to international arbitration. Going beyond what other sets of rules offer, the new SIAC Rules contain innovative changes that confirm SIAC's role as one of the world's leading international arbitration centres.



Background

Since commencing operations in 1991, SIAC arbitration has experienced phenomenal growth. In 2015, SIAC recorded the highest ever number of cases filed, number of administered cases and total sum in dispute in the history of SIAC.¹ SIAC's case filings have increased by over 250 per cent in the past 10 years.²

While SIAC has a proven track record in providing quality and neutral arbitration services in a very pro-arbitration and stable jurisdiction, there was a common desire of users and practitioners alike to update the previous 2013 SIAC Rules, not only to reflect current trends in international arbitration, but to set new standards.

The revision process was run by the SIAC Rules Revision Executive Committee in collaboration with a number of subcommittees. They were supported by the SIAC Users' Council, comprising arbitration practitioners and corporate counsel from over 30 jurisdictions. Finally, in order to allow the broadest possible input from users worldwide, draft rules were released in December 2015 for an extensive six-month public consultation process.

Early Dismissal of Claims and Counterclaims

The most remarkable amendment to the SIAC Rules is the introduction of a procedure for the early dismissal of claims and defences. As two commentators recently remarked, '[t]he perceived absence of summary judgment procedures in international arbitration is a frequent concern for many businesses across a range of industries.'³ SIAC has now addressed this concern. In line with its pioneering role, SIAC is the first major international arbitration centre to provide for such a procedure in commercial arbitration.⁴

Under the new Rule 29, a party may apply to the arbitral tribunal for the early dismissal of a claim or defence on the basis that a claim or defence is (1) manifestly without legal merit; or (2) manifestly outside the arbitral tribunal's jurisdiction.⁵

Rule 29 provides for a two-step process for the arbitral tribunal to deal with applications for early dismissal. First, the arbitral tribunal decides, at its discretion, whether an application for early dismissal should be allowed to proceed at all.⁶ Then, if the application is allowed to proceed, the tribunal must give the parties the

opportunity to be heard before issuing—as the case may be—an order or an award, which must state the reasons in summary form, within 60 days of the filing of the application.⁷

It remains to be seen how these 'dispositive motions' will be handled in practice. The fact that the SIAC Rules do not set a time limit to file the application for early dismissal bears the danger of eliciting untimely applications. Although the tribunal will probably not allow an untimely application to proceed under the two-step process described above, such an application is likely to waste time and money. It also remains to be seen how tribunals will interpret the new provision, which—as with any new provision—entails a risk of inconsistent application. More importantly maybe, tribunals may generally be reluctant to grant applications for early dismissal for due progress considerations. Therefore, parties filing an application for early dismissal will be well advised to demonstrate to the tribunal that granting 'summary judgment' will not offend rules of natural justice.

Notwithstanding these reservations, Rule 29—when duly applied by a robust tribunal—can be expected to result in significant time and costs savings. It also sets the revised SIAC Rules apart from other institutional rules and will serve as an additional selling point for SIAC arbitration.

Dealing with Complex Arbitrations—Joinder, Consolidation and Multiple Contracts Introduction

The new provisions in Rules 6, 7 and 8 take into account the increasing number of complex disputes that go to arbitration involving multiple contracts and/or multiple parties.⁸ While the 2013 SIAC Rules included a provision on joinder in Rule 24(b), there were no provisions expressly dealing with consolidation of multiple arbitrations or arbitrations concerning disputes arising out of a multitude of contracts.

Rules 6, 7 and 8 generally reflect current practice in international arbitration with regard to joinder, consolidation and multiple contract scenarios, but are noteworthy in that, in some aspects, they go beyond what other institutions offer and grant parties to SIAC arbitrations greater flexibility in dealing with complex arbitrations than other sets of arbitration rules do.⁹

Joinder of Additional Parties

The new Rule 7 pertains to the issues of joinder. 'Joinder', according to the SIAC rules, refers to the adding of one or more parties as a claimant or a respondent to an existing arbitration. Joinder may occur upon the request of one of the original parties to that arbitration, but can also be requested by a non-party seeking to join the arbitration in question.

The joinder provision in the 2016 Rules goes beyond the joinder provision in the 2013 Rules. It also gives parties to SIAC arbitrations more options to join additional parties to an existing arbitration than under other sets of arbitration rules.

Rule 7 expressly allows for joinder both before and after the constitution of the arbitral tribunal. Prior to the appointment of any arbitrator, joinder is possible provided that

- (1) the party to be joined as a claimant or a respondent is *prima facie* bound by the arbitration agreement; or,
- (2) that all parties, including the additional party to be joined, consent to the joinder.¹⁰

At this stage, the decision to join an additional party lies with the SIAC Court.¹¹ After the commencement of the arbitration, it is for the arbitral tribunal to rule on any joinder request.¹² The tribunal may join an additional party under the same conditions as the Court.¹³

A party having failed to join another party before the constitution of the tribunal is given a second bite at the apple and can apply again to the tribunal once constituted.¹⁴ This acknowledges the fact that the Court may not in all cases be in a position to make an informed decision at such an early stage of the proceedings, either because joinder may not seem appropriate at that time or because the information available is insufficient to make a conclusive determination.

Rule 7.4 and Rule 7.10 confirm that Rule 7 only sets out the procedural framework for joining an additional party to a pending arbitration. It does not create a jurisdictional basis for the party to be joined.¹⁵ In other words, the party seeking to join or have another party joined in the arbitration will still have to establish, on the basis of the applicable legal principles (not the SIAC Rules), that there is a valid arbitration agreement binding the party

to be joined. This important distinction appears to be overlooked at times, when 'joinder' is used as a synonym to or basis for extending an arbitration agreement to a 'non-signatory'.

Where an application for joinder is granted, any party who has not participated in the constitution of the arbitral tribunal is deemed to have waived its right to nominate an arbitrator or otherwise participate in the constitution of the arbitral tribunal.¹⁶

Consolidation

The new Rule 8 deals with consolidation; that is, the merging of two or more arbitrations into one. The 2013 SIAC Rules did not contain any express provision to that effect.

Like the provision on joinder, Rule 8 provides for two distinct situations of consolidation, one by the Court prior to the appointment of the arbitral tribunal¹⁷ and the other by the arbitral tribunal after its constitution.¹⁸

Prior to the full constitution of the arbitral tribunal, consolidation is possible in three situations, namely:

- (1) if all parties agree to consolidation;
- (2) if all claims made in the arbitrations fall under the same arbitration agreement; or,
- (3) where the arbitration agreements are compatible and (a) the disputes in the arbitrations concern the same legal relationship(s); (b) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (c) the disputes arise out of the same transaction or series of transactions.¹⁹

The Court's decision to grant an application for consolidation is without prejudice to the arbitral tribunal's power to subsequently decide any question as to its jurisdiction. Similarly, the Court's decision to reject the application is without prejudice to a party's right to apply for consolidation to the arbitral tribunal once it is constituted. So here, too, the parties get a second chance to consolidate their arbitrations.

After the constitution of the arbitral tribunal in any of the arbitrations sought to be consolidated, the request for consolidation must be made to that arbitral tribunal. The arbitral tribunal may consolidate two or more arbitrations



SIAC was, and still remains, one of the pioneers of emergency arbitration.

pending under the SIAC Rules into a single arbitration, provided that:

- (a) all parties to the arbitrations agree to consolidation;
- (b) all the claims in the arbitrations are made under the same arbitration agreement, the same arbitral tribunal has been appointed in each of the arbitrations or no arbitral tribunal has been constituted in the other arbitration(s); or,
- (c) the arbitration agreements are compatible, the same arbitral tribunal has been appointed in each of the arbitrations or no arbitral tribunal has been constituted in the other arbitration(s) and the disputes arise out of (i) the same legal relationship(s); (ii) contracts consisting of a principal contract and its ancillary contracts; or (iii) the same transaction or series of transactions.²⁰

In line with most other sets of arbitration rules,²¹ consolidation is admissible in both scenarios even if not all parties agree to consolidation, provided that the stipulated prerequisites are met.

Multiple Contracts

The new Rule 6 introduces a process for parties to

commence arbitral proceedings arising out of or in connection with multiple contracts. The 2013 SIAC Rules did not contain any express provision to that effect.

Rule 6 provides an innovative approach to multi-contract proceedings by creating a direct link between arbitrations brought under multiple contracts and consolidation of arbitrations. Under this provision, the party who wishes to initiate arbitration proceedings under multiple contracts and/or arbitration agreements has two avenues: it can either:

- (1) file a Notice of Arbitration in respect of each arbitration agreement invoked, and concurrently submit an application for consolidation under Rule 8.1; or
- (2) file a single Notice of Arbitration in respect of all the arbitration agreements invoked, which shall include a statement identifying each contract and arbitration agreement invoked and a description of how the applicable criteria under Rule 8.1 are satisfied.²² In this case, the Claimant shall be deemed to have commenced multiple arbitrations, one in respect of each arbitration agreement invoked, and the Notice of Arbitration shall be deemed to be an application to consolidate all such arbitrations pursuant to Rule 8.1.²³

An Even More Efficient Process

The 2016 SIAC Rules have also introduced a number of changes aimed at further optimising the arbitral process under the SIAC Rules. These changes relate, *inter alia*, to improvements to the existing emergency arbitrator and expedited procedures.

Emergency Arbitrator

SIAC was, and still remains, one of the pioneers of emergency arbitration. The emergency arbitrator procedure under the SIAC Rules has been a true success story. Provisions on an emergency arbitrator procedure were already included in the 2010 and 2013 SIAC Rules and SIAC has administered 50 such proceedings as of 1 June 2016,²⁴ far exceeding the numbers of most other institutions. The most recent amendments will further enhance the efficiency and cost-effectiveness of the emergency arbitrator process for the benefit of its users.

The new Rules shorten the overall schedule of the emergency arbitrator proceedings. At the outset of the process, the appointment of an emergency arbitrator must be made within one day (instead of, as previously, one business day) of the application for emergency interim relief and payment of the administration fees and deposits.²⁵ Furthermore, the revised Rules provide that the emergency arbitrator's order or award shall be made within 14 days from the emergency arbitrator's appointment, unless—as an exception—the Registrar extends the time.²⁶

The powers of the emergency arbitrator have been expanded in that the emergency arbitrator not only has the power to order or award any interim relief that he or she deems necessary, but now also has the express power to make preliminary orders pending any hearing, telephone conference or written submissions by the parties.²⁷ This allows the emergency arbitrator to issue so-called holding orders in cases of extreme urgency or where there is an imminent risk that a party might dissipate assets or otherwise frustrate the purpose of the interim relief sought from the emergency arbitrator. The provision is a very welcome clarification of the powers of an emergency arbitrator, although it does not allow for the issuance of true *ex parte* interim relief in that a preliminary order can be granted prior to the notification of the request to the responding party.²⁸

The amendments made to the emergency arbitrator procedure reflect SIAC's aspiration to offer an expedient

and straightforward process for emergency interim relief proceedings. These changes will improve an already efficient process and will reinforce SIAC's role as a frontrunner in terms of emergency arbitrator procedures.

Expedited Procedure

The expedited procedure under the SIAC Rules has been slightly modified. To allow more cases to be submitted to this procedure, the monetary threshold for the applicability of the expedited procedure has been raised from SGD 5 million to SGD 6 million. Rule 5.2(b) further specifies that when the expedited procedure applies, the case shall be referred to a sole arbitrator even where the arbitration agreement provides for more than one arbitrator.

While the 2013 SIAC Rules provided that, as a default rule, the arbitral tribunal had to hold a hearing, new Rule 5.2(c) stipulates that it is for the tribunal, in consultation with the parties, to decide if the dispute shall be decided on the basis of documentary evidence only, or if a hearing is required.

Outlook—The SIAC Investment Arbitration Rules

The 2016 revision of the SIAC Rules will be complemented by the introduction of an entirely new set of rules specifically designed for investment disputes: the SIAC Investment Arbitration Rules.

The draft SIAC Investment Arbitration Rules are based on the SIAC Rules but are tailored to the particularities of investment arbitration. They aim at an efficient resolution of investment disputes by addressing the complaints frequently raised in relation to investment dispute resolution, namely the length, costs and constraints of investment arbitration proceedings.

Among the most significant innovations, the SIAC Investment Arbitration Rules impose strict timelines on the arbitral tribunal's appointment and challenge process, introduce recourse to an emergency arbitrator for emergency interim relief, provide for an early dismissal mechanism in case of manifestly unmeritorious claims or in case the tribunal manifestly lacks jurisdiction, and set out provisions that deal with third-party funding, which are nonexistent in many other rules. They also provide for specific rules regarding submissions by non-disputing parties, recognising that investment disputes often involve matters of public interest.

At the time of writing, the consultation process is in its final stages and the SIAC Investment Arbitration Rules are expected to enter into force at the end of 2016 or early 2017.

Conclusion

With the adoption of the 2016 SIAC Rules, SIAC successfully tackles the growing complexity of international commercial disputes and introduces innovative changes that confirm SIAC's role as one of the world's leading international arbitration centres.

The SIAC Rules now enable parties to resolve, where appropriate, all relevant disputes in a single arbitration, preventing the duplication of work and the risk of contradictory or conflicting results. SIAC has also made state-of-the-art changes to improve time efficiency and cost effectiveness of the arbitral process, in particular by refining and clarifying its emergency arbitrator and expedited procedures. By introducing an innovative manner to allow for the early dismissal of claims and defences, and soon a whole new set of Investment Arbitration Rules, SIAC positions itself not only as a leading arbitration institution but as a pioneer in the development of international arbitration practice.

Notes:

- 1 SIAC Annual Report 2015 available at www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report.
- 2 *Ibid.*
- 3 Philip Chong, Blake Primrose, 'Summary Judgment in International Arbitrations Seated in England', *Arbitration International* (2016), pp 1-17, at p 1.
- 4 The Stockholm Chamber of Commerce (the 'SCC') is following suit in the context of the revision of its arbitration rules by introducing a provision on early dismissal: see Article 39 of the 2017 draft SCC Rules. The early dismissal of claims and defences provision is inspired by investment arbitration practice, in particular by Article 41(5) of the ICSID Arbitration Rules. The Arbitration Rules of the Netherlands Arbitration Institute include provisions on 'summary arbitral proceedings: see Article 36 of the NAI Rules. These provisions, crafted after the so-called *kort geding* proceedings in Dutch civil procedure law, are closer to interim relief proceedings than provisions providing for the early dismissal of claims and defences.
- 5 Rule 29.1.
- 6 Rule 29.3.
- 7 Rule 29.4.
- 8 It has been reported that around one third of arbitration proceedings worldwide nowadays involve more than two parties: see Ruth Stackpool-Moore, 'Joinder and Consolidation—Examining Best Practice in the Swiss, HKIAC and ICC Rules', in *10 Years of Swiss Rules of International Arbitration*, ASA Special Series No 44, 2014, at p 16; Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', in *50 Years of the New York Convention: ICCA International Arbitration Conference 14 ICC Congress Series*, 2009, at p 343.
- 9 See e.g., Articles 7-10 of the 2012 Rules of International Arbitration of the International Chamber of Commerce (the 'ICC Rules') on multiple

parties, multiple contracts, joinder and consolidation; Article 4 of the 2012 Swiss Rules of International Arbitration (the 'Swiss Rules') on consolidation and joinder; Article 22.1(viii) to (x) of the 2014 London Court of International Arbitration (the 'LCIA Rules') on joinder and consolidation; Articles 27-29 of the 2013 Hong Kong International Arbitration Centre (the 'HIAC Rules') on joinder, consolidation and multiple contracts; and Articles 18 and 19 of the 2015 China International Economic and Trade Arbitration Centre (the 'CIETAC Rules') on joinder and consolidation.

- 10 Rule 7.1.
- 11 Rule 7.1.
- 12 Rule 7.10.
- 13 Rule 7.8.
- 14 Rule 7.4.
- 15 Similarly for the Swiss Rules, see Philippe Bärtsch, Angelina Petti, *Swiss Rules of International Arbitration, Commentary* (2nd edn, 2013), ad Article 4, at para 48.
- 16 Rule 7.12.
- 17 Rule 8.1.
- 18 Rule 8.7.
- 19 Rule 8.1.
- 20 Rule 8.7.
- 21 See Article 10 of the ICC Rules; Article 28.1 of the HKIAC Rules; Article 22.1(x) of the LCIA Rules; Article 4(1) of the Swiss Rules.
- 22 Rule 6.1.
- 23 Rule 6.1.
- 24 Statistics available at www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics.
- 25 Schedule 1, Rule 3.
- 26 Schedule 1, Rule 9.
- 27 Schedule 1, Rule 8.
- 28 Rule 1 of Schedule 1 still provides that the party making a request for emergency relief must, at the same time as it files the application for emergency interim relief, send a copy of the application to all other parties. Presumably, this is a mandatory provision.



Christopher Boog
Partner, Vice Chair International
Arbitration, Schellenberg Wittmer

Christopher Boog is based in Singapore. Christopher represents clients and acts as arbitrator in disputes related to construction and engineering projects, commodities, the energy sector (including oil and gas) and the pharmaceutical, life sciences and automotive industries.

From Drawings to a Multidimensional Database: Does Building Information Modelling Challenge the Building Process and the Rules Dedicated to Public Procurement?

A few years ago French architects and owners often seemed reluctant to change the usual building process and use Building Information Modelling ('BIM')¹ to develop construction projects. But now there is no doubt that the French construction industry has taken BIM seriously and made up for any lost time. If BIM does challenge the traditional work process, from the conception to execution phases, it does not necessarily revolutionise all applicable rules, except perhaps when public procurement is involved. On the contrary, collaborative working methods may call for a change—not necessarily in the mutual scope of intervention of key actors—but in the task allocation process, from architects to builders and supervising officers. Lawyers will obviously have to take BIM into consideration in contractual documents and have a global legal vision of what is at stake when BIM is involved.



History

On 24 June 2014, French Secretary Sylvia Pinel launched a mission on digital technology applied to the construction industry. After six months of consultations with private and public entities, a final report was published on 2 December 2014 with four recommendations: (1) to convince all the key actors of the building industry to take the path of digital transition in the building process; (2) to meet the needs of technical facilities and a rise in digital skills, in particular for SMEs; (3) to develop tools adapted to the size of all construction projects; and (4) to instil confidence in the ecosystem of French digital technology. On 10 December 2014, €20 million of the compensation fund for construction risk insurance was dedicated to support the development of a digital transition plan for the building process. Bertrand Delcambre was appointed as Chairman of the supervising comity, the task of which was dedicated to the following topics:

- supporting actors of the French ecosystem of the digital economy;
- encouraging project management in the digital use in public procurement procedures;
- facilitating the use of digital skills for small structures;
- demonstrating the effectiveness of digital modelling

- at all stages of the building process, then in phase of operation, maintenance and renovation of buildings;
- developing ownership of digital tools for managing the operational phase, once the building has been delivered to the owner;
- convincing of the proof of the effectiveness of the tools, in terms of cost (that is, reduction of loss ratio) and quality (identification of clash);
- taking the leap of digital building, with the digital monitoring and maintenance booklet;
- adapting initial and continuous training for the professionals involved;
- ensuring interoperability of tools;
- preserving intellectual property and copyright; and
- participating in digital law.

Other public initiatives gave birth to a series of recommendations on BIM. Among them, the plan for sustainable building rendered a full report on BIM and asset management under the supervision of Frank Hovorka, from the French Caisse des Dépôts et des Consignations ('CDC') and Pierre Mit, Chairman of the National Union of Construction Economists and Coordinators ('Untec') in March 2014.² The working group on digital law applied to building also rendered its own recommendations on 4 March 2016.³ More recently, the

building architecture urban plan ('PUCA'), in partnership with the Association of Condominium Managers ('ARC'), the Association of Regions of France ('ARF'), the CDC and the Social Union for Housing ('USH'), launched as part of the digital transition plan in construction, a new session of submissions for experiments and collection of good practices on BIM implementation. This second session aims to reference and experiment continuous construction and rehabilitation process using BIM to significantly improve the cost-benefit ratio over the entire life span of buildings. The purpose of the consultation is twofold: (a) the creation of a corpus of good practices around BIM, based on concrete cases of implementation; and (b) the selection process of concepts, ideas and services, all BIM-compatible, that could lead to formal experimentation.⁴

Applicable Rules

So far, no specific legal rules have been adopted in France to implement the use of BIM in the construction process, except with the transposition into French law of the EU Directive 2014/24/EU on Public Procurement.⁵ The French ordinance of 23 July 2015 on public procurement⁶ and its Decree of 25 March 2016⁷ enacted new rules on public procurement that entered into effect on 1 April 2016. Article 42 of the French Decree empower any public procurer to require the use of specific electronic tools, such as building information electronic modelling tools or similar. Nevertheless, the public procurer shall also provide the small competitor with alternative means of access to the competition (meaning appropriate free of use tools and software).

Observers will notice that, for the time being, public authorities prefer to promote the use of BIM through public competition, rather than adopting compulsory rules, applicable to both the private and public sector. To that extent, France has chosen to differ from other foreign regulations, such as in Finland, Hong Kong, Russia, South Korea, the United Kingdom and the United States.⁸

For the time being, the private sector is still cautious about BIM, although the variety of construction projects using BIM has increased over recent years. In any event, generalisation of BIM in the building process will require contractual adjustment in models and templates, as for public (French GCC—so called 'CCAG'), as private operations. In fact, BIM development will probably call for new apprehension of an architect's scope of work, from conception to execution phases, the new drafting

of contractual documents and a variety of changes in the working process. A collaborative working process between the architects and the main contractor and sub-contractor may also have effects on liabilities that should be anticipated in contracts. Intellectual property will also need to be considered, although BIM does not seem to be as revolutionary as it may seem on this matter.

BIM and French Public Procurement Regulation

Public building projects comply with specific rules to ensure fair competition and equality, which are of paramount importance in the French public legal system. Among them, the prerequisite definition by the public procurer of its needs and expectancies⁹ stress the importance of BIM knowledge and the impact on construction projects. In other words, the public procurer shall have due competence in mastering BIM (either directly or through another professional), so that he may draft appropriate contract notice and specification requirements. Such documents must be clear, precise



and explain the 'Level of Details' ('LOD') expected from the competitor for each phase of the building project. As these specifications cannot encroach on the competition/equality rules, the public procurer won't impose any formal methods but will only ask for a certain result to be achieved.

BIM cannot be an excuse to override the basic criteria of free access to competition, equality of treatment and total transparency of the selection procedure. When a BIM design is required for the competitor's selection, the public procurer will then have to ensure that the digital model provided by the competitor respects the anonymity rule. Considering the cost of development of a design model, the competitor will also have to foresee compensation/indemnity for providing such digital model in the selection process. In any case, when a predefined digital model is given to the competitor, this model shall be secured and non-editable, to ensure maximum security and prevent any malfunction of the digital model in the following building process.

Changes in Working Process

It is clear that BIM introduces a sweep of change in the usual missions of the key actors. A new collaborative working process is deeply linked with the development of BIM and its success. As such a process may shift the usual boundaries between key actors of the construction process, one can ask if BIM development urges a new understanding of the various missions given to one's architects or contractors. The private sector will easily adapt the contractual provisions to the rise of BIM in the building process. In this matter, freedom of contract remains the rule and contractual adaptation is quite easy.

As far as French Law is applicable to the contract, the drafter will take into consideration the new provisions of Article 1101 of the French civil code that entered into effect on 1 October 2016).¹⁰ On the other hand, the public sector will have to match the public order provisions of Article 7 of the so-called Loi MOP of 12 July 1985 which gives a full listing of the components of any project manager's mission¹¹ with the new role and



expectations related to BIM. Article 15 of Decree n°93-1268 of 29 November 1993 details the content of the basic core mission applicable for new buildings. This mission traditionally includes the sketch studies, pre-project studies, project studies, assistance provided to the contracting authority for the award of works contracts, management of the execution of the works contract and assistance to the project owner during acceptance operations and during the completion guarantee period.

Examining compliance with project design studies when they are made by a contractor and implementing studies when they are made by the main contractor are also part of the basic core mission of the project manager/architect. To what extent does BIM challenge those classic items of a project owner's mission? Are they necessarily fully compatible with the change in the working process arising from BIM or do they need legal adaptation as far as public order regulation is concerned?

The answers to these questions may come from simple considerations. Most of the time BIM does not formally modify the scope of work of the building actors, it only modifies the way any key actor should work with another, from the owner to the project manager, the different contractors and the technical supervisor. In other words, if BIM does not necessarily require redefinition of the classical core missions, it may introduce a shift in the amount of work at the different building project phases. This may be the main area of change to consider. Sketch studies, pre-project studies and project studies, when made on BIM, will constitute a major part of the classic core mission, with more anticipated work than ever before (with 2D drawings and papers). The level of development of the design model will also interfere with the quantity of details and the importance of the works to be delivered. Adaptation of the legislative framework will also become necessary to replace traditional contractual requirements such as 2D plans and documents, by a precise level of a multi-dimension design model.

In summary, BIM will probably lead to more work in the preliminary phases of the architect's mission and urge redefinition of the allocation of funds dedicated to the project in its early development stage, especially when the architect will be entitled to ensure the development, preservation and consistency of the design model. The traditional core mission of the project manager has now

come to a time when it will be necessary to evolve with the integration of the BIM specificities, when the owner will need extra assistance for determining (1) the goals and the level of development of the multi dimension design model; (2) the conception of the model and its functioning; and (3) the management and the securing of the design model.

Adaptation of Contractual Documents

Contractual documents will necessarily adapt. The usual models and templates for construction contracts still prevail but one must consider the emergence of BIM in the building process. First, contractual provisions shall take into account the potential change in the traditional sequencing of the project: the design model will enable the project manager and constructor to identify potential clashes prior to the building phase of the project, as it will give the opportunity to any contractor, with the project manager and the owner, to test a multiple combination of works. As a collaborative working process will increase, the design model will change the traditional course of time in the erection process: from paper plans to construction to a multiple level of 3D development of a building avatar, which will prevent any misconduct in the construction process.

As all contractors shall be deemed by a mutual and uniform process, contractual documents shall refer to a general binding BIM protocol, the provisions of which will organise the basic rules of the collaborative working process and guarantee safety of the design model and data integrated in the course of the development of the project. This document shall consider the specified needs of the project and its design model and therefore will necessarily adapt general guidelines that have been published in the legal and technical literature. But choosing to draft a BIM convention is still a question of comfort, as traditional contractual provisions will probably adapt within the coming years, pursuant to the variety of feedback that the numerous BIM projects will provide.

Focus on Intellectual Property

BIM also focuses attention on intellectual property. Discussion of BIM often raises multiple questions on intellectual property rights. French legislation in this area is codified in the Intellectual Property Code ('IPC')¹². Its provisions on copyright (which includes software protection), designs, databases, patents and trademarks must be taken into consideration when drafting the BIM

convention or contracts, but also by any user of the design model. As any infringement of copyright is also a crime¹³ under French law, one must be aware of the importance of contractual clauses and good practices. To that extent, contracts will be drafted in accordance with Article L 131-1 of the IPC (for copyright), Article L 513-3 of the IPC (for licensing designs), Article L 613-8 and L 613-9 of the IPC (for patents) and Article L 714-1 of the IPC (for trademarks). Thus, written contractual provisions are necessary for copyright transfer to the owner. The contracts must ensure that each of the copyrights transferred to the owner is the subject of a separate provision in the contract, dealing with the scope of the transfer as to its destination, its geographical area and its duration. Designs, trademarks and patents shall be either transferred or, more often, licensed, and the database shall be used and protected in accordance with Articles L 342-1 to L 342-3 of the IPC.

There was a time when the building process relied only on 2D drawings and written documents and when architects did not feel not concerned about industrial process—such as those used in the aircraft and auto industries. This time seems to be over, as any student of architecture will have noticed. Software editors did not miss this design revolution, as other professionals, such as supervising officers, fear their traditional job may withdraw behind the effectiveness of design models. As for lawyers, BIM is exciting as it challenges usual model contracts and templates in the crossing over of contract law, digital law, IP and technology. The years to come will give us proper feedback on liability issues that may arise from building projects made on BIM. Liability insurers did not miss these changes also, as most of them have agreed for the time being not to increase the amount of insurance premiums.

Notes:

- 1 Building Information Modeling ('BIM') can be defined as a construction method using smart digital models which includes multidimensional representation and other construction data, aimed at a certain Level of Development ('LOD') for a prerequisite goal to be achieved.
- 2 Rapport du groupe de travail BIM et Gestion du patrimoine, dirigé par F. Hovorka et Pierre Mit.
- 3 Rapport au Président du CSCEE et au Président du PTNB, groupe de travail dirigé par Xavier Pican.
- 4 BIM-Maquette numérique—Appel à propositions de « Bonnes pratiques » et d'expérimentations.
- 5 Directive 2014/24/EU, Article 22.
- 6 Ordonnance n°2015-899 du 23 juillet 2015 relative aux marchés publics.
- 7 Décret n°2016-360 du 25 mars 2016 relatif aux marchés publics.

- 8 Copy of Worldwide BIM policy & strategy, by Poon Ella, 21 December 2015.
- 9 Article 30 of the French Ordinance of 30 July 2015; Article 2 of the so-called 'Loi MOP' of 12 July 1985.
- 10 Among them, the new Article 1104 dedicated to good faith in the negotiation, formation and execution of the contract, new Article 1110 dedicated to the membership contract, Article 1111 dedicated to the framework contract and new Article 1128 dedicated to the validity of the contract and its scope.
- 11 Article 7 of the so-called 'Loi MOP' of 12 July 1985 states that the project manager's mission is different from the contractors' missions and that such mission includes predefined topics: (1) the sketch studies; (2) the pre-project studies; (3) the project studies; (4) the assistance to the contracting authority for the award of the construction contract; (5) the execution of studies or review of compliance with the proposed visa and those that were made by the contractor; (6) the management of the execution of the works contract; (7) the scheduling, control and coordination of the site; (8) the assistance provided to the project owner during acceptance operations and during the completion guarantee period. Those items are further defined in Decree n°93-1268 of 29 November 1993.
- 12 French IPC—Code de la propriété intellectuelle.
- 13 Article L 335-2 and L 335-3 of the IPC for copyright and software; Article L 521-1 of the IPC for designs; Article L 343-4 of the IPC for databases; Article L 613-3 and L 613-4 of the IPC for patents; Article L 716-1 of the IPC for trademarks.



Jean-Olivier d'Oria
Avocat au Barreau de Paris

Jean-Olivier d'Oria has been a member of the Paris Bar since 2000 and previously worked as a private legal consultant. Through the past 17 years he developed a special practice in real estate, construction law and asset management, for both private and public clients, mostly in Europe. He is fluent in English to assist his overseas clients, but also works in Italian where necessary.

IPBA New Members

September – December 2016

We are pleased to introduce our new IPBA members who joined our association from September – December 2016. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

Australia , Neville Carter <i>College of Law</i>	Germany , Michael Molitoris <i>Noerr LLP</i>
Australia , Kanaga Dharmananda <i>Francis Burt Chambers</i>	Hong Kong , Geoffrey Lee <i>Ironshore Insurance</i>
Australia , Rebecca Anne Sandford <i>HWL Ebsworth Lawyers</i>	Hong Kong , Lesley Ann McLean <i>Robertsons</i>
Australia , Roger Saxton <i>Conner & Co.</i>	Hong Kong , Anselmo Reyes <i>Reyes Chambers</i>
Belgium , Michel Bonne <i>Van Bael & Bellis</i>	Indonesia , Alterina Hofan <i>HMP & Associates</i>
Belgium , May Lyn Yuen <i>Hogan Lovells International LLP</i>	Indonesia , M. Fattah Riphah <i>RIS & Associates Law Firm</i>
Brazil , Marcos Carrilho Rosa <i>Silva Carrilho Rosa Sociedade de Advogados</i>	Italy , Andrea Bernasconi <i>Studio Previti Associazione Professionale</i>
Canada , Charles Tingley <i>Davies Ward Phillips & Vineberg LLP</i>	Japan , Andrew de Castro <i>West Japan Engineering Consultants</i>
China , Shengjun Wang <i>Kangda Law Firm</i>	Japan , Hideaki Kinomura <i>Kinomura Law Offices</i>
Fiji , Glenis Yee <i>Munro Leys</i>	Japan , Hikaru Oguchi <i>Nishimura & Asahi</i>
France , Jean-Pascal Brun <i>DIAMETIS</i>	Japan , Gerald Thomas <i>Thomas Consultants International Co., Ltd.</i>
France , Jean-Olivier d'Oria <i>Smith d'Oria</i>	Japan , Jin Ning Tu <i>Anderson Mori & Tomotsune</i>
France , Soo-Hee Kim <i>D2K Avocats</i>	Japan , Kazuya Yamashita <i>Higashimachi, LPC</i>

Korea , Daniel Kim <i>Continental Automotive Korea Ltd.</i>	Taiwan , H. G. Chen <i>TIPLO Attorneys-at-Law</i>
Luxembourg , Yan Yang <i>AKD Luxembourg</i>	Taiwan , Michael Fahey <i>Winkler Partners</i>
Malaysia , Anand Raj <i>Shearn Delamore & Co.</i>	Taiwan , Chiahao Liang <i>Chang-Ying Law Firm</i>
Malaysia , Rishwant Singh <i>Cecil Abraham & Partners</i>	Taiwan , Grace W. T. Liao <i>TIPLO Attorneys-at-Law</i>
New Zealand , Kathryn Beck <i>New Zealand Law Society</i>	Taiwan , J. K. Lin <i>TIPLO Attorneys-at-Law</i>
New Zealand , Henry John Brandts-Giesen <i>Kensington Swan</i>	Taiwan , Chung-Cheng Liu <i>TIPLO Attorneys-at-Law</i>
New Zealand , Philip Joyce <i>Fyers Joyce</i>	Taiwan , Bonnie F. I. Su <i>TIPLO Attorneys-at-Law</i>
New Zealand , Timothy John MacAvoy <i>Kensington Swan</i>	Taiwan , Pi-Song Tsai <i>Wong & Co Law Offices</i>
New Zealand , Edwin Morrison <i>Kirkland Morrison O'Callahan</i>	Taiwan , Ting Ting Wu <i>TIPLO Attorneys-at-Law</i>
New Zealand , James Nolen <i>Kirkland Morrison O'Callahan</i>	Thailand , Jessada Sawatdipong <i>Chandler and Thong-ek Law Offices Limited</i>
New Zealand , Helen Rebecca Smith <i>Simpson Grierson</i>	United Kingdom , Tony Dymond <i>Debevoise & Plimpton LLP</i>
Pakistan , Usama Mehmood <i>Walayat Law Associates</i>	United Kingdom , Susan McFarlane <i>Mitsubishi UFJ Trust International Limited</i>
Philippines , Chantal Chua <i>Cochingyan & Peralta Law Offices</i>	United Kingdom , Stephen Nathan <i>Blackstone Chambers</i>
Singapore , Ramon Ghosh <i>Control Risks</i>	USA , Jerry Carter <i>Masuda, Funai, Eifert & Mitchell, Ltd.</i>
Singapore , Gabriel (Roy) Goh De En <i>G&L Chartered Business Consultancy Pte Ltd.</i>	USA , Jamie Chuck <i>Jamie A Chuck AAL ALC</i>
Singapore , Chye Hoon Ho <i>KEL LLC</i>	USA , Asa Markel <i>Masuda, Funai, Eifert & Mitchell, Ltd.</i>
Singapore , Rachael Leong <i>Oon & Bazul LLP</i>	USA , Kathy Nguyen <i>Freshfields Bruckhaus Deringer</i>
Singapore , Yu Chong Aaron Leong <i>Oon & Bazul LLP</i>	USA , Shimpei Oki <i>Goodsill Anderson Quinn & Stifel</i>
Singapore , Marc Rathbone <i>Nabarro LLP Singapore</i>	

Members' Notes

Jean-Olivier d'Oria, French

Jean-Olivier d'Oria has been a member of the Paris Bar since 2000, previously working as a private legal consultant. Through the past 15 years he has developed a specialist practice in real estate-construction law and asset management for both private and public clients, mostly in Europe. For overseas clients he is fluent

in English, but also works in Italian if necessary. Old Europe meeting far east Asia is a thrilling challenge he chose to meet when joining IPBA this summer. Jean-Olivier is married and has two grown-up children. He is also a collector of contemporary arts.

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

Please note that the IPBA Publication Committee has moved away from a theme-based publication. Hence, for the next issues, we are pleased to accept articles on interesting legal topics and new legal developments that are happening in your jurisdiction. Please send your article to both **Leonard Yeoh** at leonard.yeoh@taypartners.com.my and **John Wilson** at advice@srilankalaw.com. We would be grateful if you could also send (1) a lead paragraph of approximately 50 or 60 words, giving a brief introduction to, or an overview of the article's main theme, (2) a photo with the following specifications (File Format: JPG or TIFF, Resolution: 300dpi and Dimensions: 4cm(w) x 5cm(h)), and (3) your biography of approximately 30 to 50 words together with your article.

The requirements for publication of an article in the *IPBA Journal* are as follows:

1. The article has not been previously published in any journal or publication;
2. The article is of good quality both in terms of technical input and topical interest for IPBA members;
3. The article is not written to publicise the expertise, specialization, or network offices of the writer or the firm at which the writer is based;
4. The article is concise (2500 to 3000 words) and, in any event, does not exceed 3000 words; and
5. The article must be written in English, and the author must ensure that it meets international business standards.
6. The article is written by an IPBA member. Co-authors must also be IPBA members.



An Invitation to Join the Inter-Pacific Bar Association

The Inter-Pacific Bar Association (IPBA) is an international association of business and commercial lawyers who reside or have an interest in the Asian and Pacific region. The IPBA has its roots in the region, having been established in April 1991 at an organising conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then it has grown to over 1400 members from 65 jurisdictions, and it is now the pre-eminent organisation in the region for business and commercial lawyers.

The growth of the IPBA has been spurred by the tremendous growth of the Asian economies. As companies throughout the region become part of the global economy they require additional assistance from lawyers in their home country and from lawyers throughout the region. One goal of the IPBA is to help lawyers stay abreast of developments that affect their clients. Another is to provide an opportunity for business and commercial lawyers throughout the region to network with other lawyers of similar interests and fields of practice.

Supported by major bar associations, law societies and other organisations throughout Asia and the Pacific, the IPBA is playing a significant role in fostering ties among members of the legal profession with an interest in the region.

IPBA Activities

The breadth of the IPBA's activities is demonstrated by the number of specialist committees. All of these committees are active and have not only the chairs named, but also a significant number of vice-chairs to assist in the planning and implementation of the various committee activities. The highlight of the year for the IPBA is its annual multi-topic four-day conference, usually held in the first week of May each year. Previous annual conferences have been held in Tokyo (twice), Sydney (twice), Taipei, Singapore (twice), San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali and Beijing attracting as many as 1000 lawyers plus accompanying guests.

The IPBA has organised regional conferences and seminars on subjects such as Practical Aspects of Intellectual Property Protection in Asia (in five cities in Europe and North America respectively) and Asian Infrastructure Development and Finance (in Singapore). The IPBA has also cooperated with other legal organisations in presenting conferences – for example, on Trading in Securities on the Internet, held jointly with the Capital Market Forum.

IPBA members also receive our quarterly IPBA Journal, with the opportunity to write articles for publication. In addition, access to the online membership directory ensures that you can search for and stay connected with other IPBA members throughout the world.

APEC

APEC and the IPBA are joining forces in a collaborative effort to enhance the development of international trade and investments through more open and efficient legal services and cross-border practices in the Asia-Pacific Region. Joint programmes, introduction of conference speakers, and IPBA member lawyer contact information promoted to APEC are just some of the planned mutual benefits.

Membership

Membership in the Association is open to all qualified lawyers who are in good standing and who live in, or who are interested in, the Asia-Pacific region.

- | | |
|--|---------|
| • Standard Membership | ¥23,000 |
| • Three-Year Term Membership | ¥63,000 |
| • Corporate Counsel | ¥11,800 |
| • Young Lawyers (35 years old and under) | ¥6000 |

Annual dues cover the period of one calendar year starting from January 1 and ending on December 31. Those who join the Association before 31 August will be registered as a member for the current year. Those who join the Association after 1 September will be registered as a member for the rest of the current year and for the following year.

Membership renewals will be accepted until 31 March.

Selection of membership category is entirely up to each individual. If the membership category is not specified in the registration form, standard annual dues will be charged by the Secretariat.

There will be no refund of dues for cancellation of all membership categories during the effective term, nor will other persons be allowed to take over the membership for the remaining period.

Corporate Associate

Any corporation may become a Corporate Associate of the IPBA by submitting an application form accompanied by payment of the annual subscription of (¥50,000) for the current year.

The name of the Corporate Associate shall be listed in the membership directory.

A Corporate Associate may designate one employee ('Associate Member'), who may take part in any Annual Conference, committee or other programmes with the same rights and privileges as a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.

A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

- Annual Dues for Corporate Associates ¥50,000

Payment of Dues

The following restrictions shall apply to payments. Your cooperation is appreciated in meeting the following conditions.

1. Payment by credit card and bank wire transfer are accepted.
2. Please make sure that related bank charges are paid by the remitter, in addition to the dues.

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See overleaf for membership
registration form





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IPBA MEMBERSHIP REGISTRATION FORM

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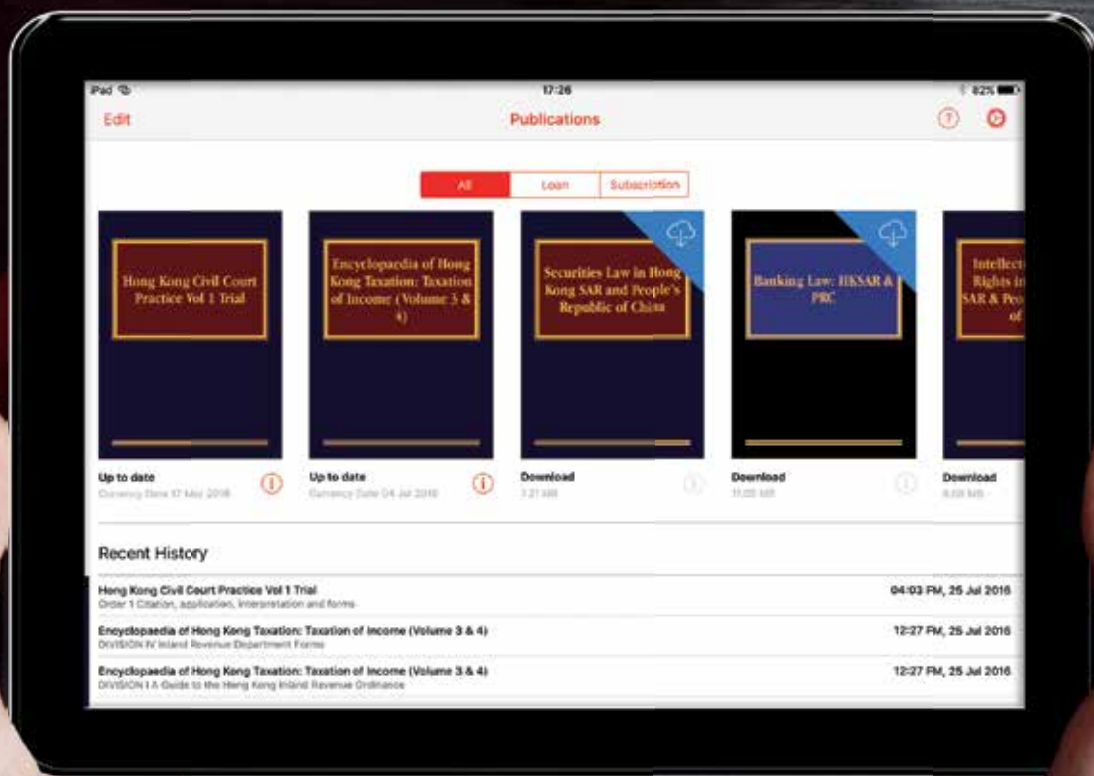
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